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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1933

## No. 213

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

*vs.*

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED JULY 19, 1933.

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[fol. 1]

**IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

Equity No. 4067R

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, Ray L. Edgar and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Action to Enjoin Collection of Taxes under California Use Tax Act of 1935

BILL OF COMPLAINT—Filed August 11, 1936

[fol. 2] The Pacific Telephone and Telegraph Company, a corporation, presents this its verified bill of complaint against defendants above named and designated, and for cause of action complains and alleges as follows:

I

Status of the Parties, and Other Corporations Herein Mentioned

(a) Plaintiff, The Pacific Telephone and Telegraph Company, is, and at all times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen and a resident of said State of California. For many years last past, and at all times mentioned herein, plaintiff has been and now is a telephone and telegraph company engaged exclusively in interstate and intrastate telephone and telegraph commerce and business, and its said interstate and intrastate telephone and telegraph commerce and business are inextricably intermingled, and it could not discontinue its said intrastate commerce and business without being

compelled to withdraw from its interstate commerce and business.

(b) The defendant John C. Corbett is a citizen and resident of the State of California residing in San Francisco in said state; the defendant Fred E. Stewart is a citizen and resident of the State of California, residing in the City of Oakland in said state; the defendant Richard E. Collins is a citizen and resident of the State of California, residing in the City of Redding in said state; the defendant Ray L. Edgar is a citizen and resident of the State of California, residing in the City of San Diego in said state; and the defendant Ray L. Riley is a citizen and resident of the State of California, residing in the City of Sacramento in said state, and said persons constitute the State Board of Equali- [fol. 3] zation of the State of California.

(c) At all times hereinafter mentioned the defendant State Board of Equalization of the State of California was and now is an official board, organized and existing under and by virtue of the constitution and laws of the State of California, consisting of the persons named and described in the foregoing paragraph, with the Controller of the State, Ray L. Riley, acting as an ex-officio member thereof.

(d) The defendant U. S. Webb is a citizen and resident of the State of California, residing in the City of San Francisco, and is the duly elected, qualified and acting Attorney General of the State of California.

(e) Western Electric Company, Incorporated, is and at all times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen and a resident of said State of New York. Said company maintains two places of business in the State of California, to wit, one at the City of Emeryville, County of Alameda, State of California, and another at the City of Los Angeles, County of Los Angeles, State of California.

## II

## Jurisdiction

The grounds upon which the jurisdiction of this court depends are as follows:

(a) The matter in controversy greatly exceeds, exclusive of interest and costs, the sum or value of $3,000, to wit, an

alleged indebtedness for taxation claimed to be due to the State of California and payable to the said State Board of Equalization in the sum of money amounting to $16,544.07, and also sums of money which will continue to accrue in the [fol. 4] future according to the terms of the taxing act complained of in this action and the claims of the defendants thereunder.

(b) This suit arises under the Constitution and laws of the United States in that plaintiff seeks herein, pursuant to subsection 14 of section 41 of Title 28 of the Code of Laws of the United States, to restrain and enjoin the enforcement of that certain statute of the State of California, hereinafter described, known as the Use Tax Act of 1935, to the extent that the taxes provided for in and by said act, are imposed on certain materials purchased in interstate transactions by plaintiff from said Western Electric Company, Incorporated, at points outside of the State of California, and shipped in interstate transportation to the plaintiff at places within the State of California, for the purpose of use and thereupon used in conducting its said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, which tax, so imposed under said act, according to the particulars hereinafter related, constitutes a tax upon the use of such materials in carrying on said interstate and intrastate telephone and telegraph commerce and business and constitutes a tax and burden upon the privilege of using such materials in conducting said interstate and intrastate telephone and telegraph commerce and business and is a burden on interstate commerce contrary to and in violation of the provisions of clause 3, section 8, Article I, of the Constitution of the United States, and that the imposition and collection of said tax effectuates a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(c) The damages and injury which plaintiff would sustain by reason of said statute if the enforcement thereof in the particulars herein complained of be not restrained [fol. 5] are and would be great and irreparable, and the enforcement of collection of the taxes involved herein and claimed to be due from the plaintiff and which would become due according to the terms of said statute, and the

interpretations thereof by the defendants, and the claims for taxes asserted by said defendants against the plaintiff would continue to run to large amounts and impose upon the plaintiff much accounting work and expense in connection with making returns and payments of said taxes; and by reason of penalty provisions of the said taxing act plaintiff cannot safely disregard the same and await suits for the collection of said taxes for the purpose of testing the validity thereof because large amounts of penalties would accrue and continue to accrue if such course were followed; and the purported remedy prescribed by said taxing act of payment of taxes under protest and suit to recover the same, being the only remedy allowed to the plaintiff under the terms of said act, would and does not provide a prompt, speedy and adequate remedy at law because the purported remedy prescribed and directed in said statute is not a plain and certain remedy, is not a prompt and complete remedy, would not result in compensating plaintiff in full for all of the damages, losses and expenses which would be suffered by it, and would result in a multiplicity of actions in manner and form more particularly hereinafter related.

(d) In addition to the foregoing general statement as to the grounds upon which the jurisdiction of this court depends, the facts, circumstances and conditions hereinafter set forth in this bill of complaint, justify and necessitate the exercise of equity jurisdiction of this court, and the granting to the plaintiff of the relief herein sought, including relief by temporary restraining order, interlocutory and final injunction.

[fol. 6]

## III

### Description of Plaintiff's Telephone and Telegraph Business and Operations

For many years last past, and at all times mentioned herein, plaintiff has been and now is a telephone and telegraph company conducting and engaged exclusively in interstate and intrastate telephone and telegraph commerce and business, and its said interstate and intrastate telephone and telegraph commerce and business are inextricably intermingled as hereinabove set forth. Plaintiff's telephone and telegraph system extends into several states and is connected with other telephone and telegraph systems,

and, by means of its said telephone and telegraph system and said connections with other telephone and telegraph systems, plaintiff handles a great number of interstate communications and does a great volume of interstate business.

In the necessary operation, maintenance and repair of its said telephone and telegraph system, plaintiff purchases from said Western Electric Company, Incorporated, large amounts of tangible personal property consisting of equipment, apparatus, materials and supplies for and used as integral parts of and exclusively in, and in common for, its said interstate and intrastate telephone and telegraph commerce and business, as hereinafter more particularly alleged. Said purchases are made at points outside the State of California, and said equipment, apparatus, materials and supplies are shipped in interstate commerce by said Western Electric Company, Incorporated, to plaintiff at various points in said State of California.

During the quarterly period of three months ending June 30, 1936, plaintiff purchased from said Western Electric Company, Incorporated, at points outside the State of Cali- [fol. 7] fornia certain tangible personal property of the character hereinabove described, for the total sales or purchase price of the sum of $551,469.

A part of said property was purchased by plaintiff and shipped to it to various points in the State of California as standby telephone and telegraph facilities of plaintiff for its said interstate and intrastate telephone and telegraph business; and said part of said property was held and used by plaintiff as a part of its said interstate and intrastate telephone and telegraph system as such standby facilities as required in the performance of its obligations to the public as a public service company, and in the conduct of its said interstate and intrastate telephone and telegraph business. The total purchase price of said standby telephone and/or telegraph facilities, upon which the tax hereinafter referred to and complained of is based, is the sum of $116,387, and the amount of tax claimed by defendants to be due on account thereof under the Use Tax Act of 1935 of the State of California, the terms of which are hereinafter more fully set forth, is the sum of $3,491.61.

The remaining part of said property consisted of central office switchboards, large private branch exchange switchboards, telephone cables and components of telephone and

telegraph lines purchased by plaintiff and shipped to it from time to time, under respective specific orders of plaintiff, to various points in the State of California for the immediate installation and use by plaintiff forthwith upon its said shipment as part of the said interstate and intrastate telephone and telegraph system of plaintiff and for use exclusively by plaintiff for its said interstate and intrastate telephone and telegraph business; and said part of said property was forthwith upon its arrival installed and used by plaintiff as part of its said interstate and intrastate telephone and [fol. 8] telegraph system, and no part of said property was stored in the State of California for any period of time whatsoever. The total purchase price of said part of said property was the sum of $435,082, and the amount of tax claimed by defendants to be due on account thereof under the terms of the said Use Tax Act of 1935 of the State of California is the sum of $13,052.46.

Plaintiff intends to, and will in the future, continue to purchase from said Western Electric Company, Incorporated, at points outside the State of California like and other equipment, apparatus, materials and supplies for its purposes in conducting its said interstate and intrastate telephone and telegraph business.

The estimated amount of the sales or purchase price of tangible personal property which plaintiff, during each succeeding quarterly period as defined in said Use Tax Act of 1935, will purchase in interstate commerce at points outside the State of California, and which will be shipped to plaintiff to points within the State of California for use in the operation and conduct of plaintiff's said interstate and intrastate telephone and telegraph business, will amount to approximately $360,000; and the estimated amount of the taxes which the defendants, plaintiff is informed and believes and therefore alleges, intend to and will claim to be due from plaintiff on account of the said sales or purchase price of said property under said Use Tax Act of 1935 and the rulings and regulations made by said defendants in connection therewith, will, unless the collection of said tax is restrained by injunction, amount to the sum of approximately $12,000.

Because of the large extent of plaintiff's telephone and telegraph system so operated, it is necessary in the interest of business economy and efficient public service for plaintiff

to purchase much of its supplies in large quantities in antici-
[fol. 9] pation of current and recurring needs and to effect deliveries thereof to the extent reasonably possible in carload lots to the points of distribution and use, and it is necessary to have supplies to meet current requirements distributed over the entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements as well as the regular emergency requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time unavoidably arise from the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties which arise in connection with conducting such telephone and telegraph commerce and business, and that materials so distributed and held for such uses and the process for distribution and the holding thereof for such uses are inseparably and essentially a part of the conduct and operation of such telephone and telegraph commerce and business.

All of said articles so purchased by plaintiff from said Western Electric Company, Incorporated, were and are especially designed for use in the operation and maintenance of said telephone and telegraph system, are peculiarly adapted to telephone and telegraph uses as aforesaid and are not suitable for any other use.

Said purchases were made by plaintiff through the use of operating capital consisting of money or current assets definitely devoted to the telephone and telegraph service or through the credit of plaintiff engaged in such telephone and telegraph service; and upon the purchase of said materials and the payment therefor, the expenses therefor were charged into the capital or operating expenses of plaintiff to the appropriate accounts of capital, operation or maintenance, according to the accounting rules and regu-
[fol. 10] lations prescribed for telephone and telegraph companies engaged in interstate commerce under the rules and regulations promulgated by the Interstate Commerce Commission, and all of said items of tangible personal property so purchased by plaintiff from said Western Electric Company, Incorporated, were devoted to the telephone and telegraph service immediately upon their purchase, and that

upon the purchase of said articles, they immediately became a necessary and indispensable part of working capital, materials, supplies, equipment and instrumentalities for the operation and conduct of such telephone and telegraph business; and that the said articles, and each and all of them, became, were and are instrumentalities used indiscriminately and in common, in and for the operation and maintenance of said telephone and telegraph system for conducting said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business from the time the same were purchased therefor.

Said articles of tangible personal property underwent no storage of any character intervening between the ending of the interstate transportation thereof which followed the purchase of said items of property and the time when the same, and each thereof, were allocated and dedicated to uses in the conduct of said interstate and intrastate telephone and telegraph business by plaintiff; but, on the contrary, the said materials, and each item thereof, were purchased by plaintiff for the sole and exclusive use and conduct of its said interstate and intrastate telephone and telegraph business, and at all times from the purchase of said materials until the use thereof by plaintiff, said materials were, and each item thereof was, devoted, dedicated and set apart exclusively for use in such inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, and that any keeping or retention of said materials or any item thereof within the State of California was and is an inseparable part of the use thereof in such inextricably intermingled interstate and intrastate commerce.

[fol. 11] IV

The Pertinent Portions of the Act

The taxing act under which the tax complained of herein is claimed to arise, is an act of the State of California entitled:

"An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration

hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately."

Said act, chapter 361 of the Statutes of 1935, was approved by the Governor of the State of California June 20, 1935, and ever since has been and now is in full force and effect. For convenience of the court a full, true and correct copy of said act is attached hereto, marked Exhibit "A."

Section 3 of said act provides:

"Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property. Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer; provided further, that the board may by rule and regulation provide that a receipt from a retailer who does not maintain a place of business in this State shall also be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer."

By section 2(a) of said act, "storage" is defined to mean and include any keeping or retention in this state for any purpose except sale in the regular course of business, of [fol. 12] tangible personal property, purchased from a retailer; by section 2(b) the term "use" is defined to mean and include the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business; by section 2(c) the term "purchase" is defined to mean any transfer, exchange or barter, conditional or otherwise, in any manner or by means whatever, of tangible personal property, for a consideration; by section 2(h) "tangible personal property" as used in said act, is defined as personal property which may be

seen, weighed, measured, felt, touched or is in any other manner, perceptible to tne senses; by section 2(i) the term "business" as used in said act, is defined to include any activity, engaged in by any person, including a corporation, or caused to be engaged in by him or it with the object of gain, benefit or advantage, either direct or indirect; and by section 2(g) the term "Board" as used in said act means the State Board of Equalization of the State of California.

Section 4 of said act, so far as material to the questions herein presented, contains the following provisions, to wit:

"Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

The tax imposed by chapter 1020, Statutes of 1933, of the State of California, referred to in paragraph (a) of section [fol. 13] 4 of said act, commonly known as the "California Retail Sales Tax Act," is an act imposing a tax for the privilege of selling, renting or leasing tangible personal property within the State of California and the effect of the exemption provision contained in said paragraph (a) of said section 4 is to make the said use tax applicable only to tangible personal property purchased in interstate transactions from retailers or sellers outside of the State of California.

Other provisions of the said Use Tax Act require that every retailer, selling tangible personal property for storage, use or other consumption in this state, shall register with the Board and give the name and address of all agents operating in this state, the location of any and all distribution or sales houses or offices, or other places of business in this state, and such other information as the Board shall require (section 5); and that every retailer, maintaining a place of business in this state and making sales of tangible personal

property for storage, use or other consumption in this state, not exempted under the provisions of section 4 of said act, shall, at the time of making such sales, collect the tax imposed by this act from the purchaser (section 6); and it is further provided that the tax imposed by said act shall be due and payable quarterly to the State Board of Equalization on or before the fifteenth day of the month next succeeding each quarterly period, the first quarterly period provided for in said act, commencing with the first day of July, 1935 (section 7). Every retailer maintaining a place of business in this state is required by said act (section 7) to file with the said Board on or before the fifteenth day of the month following the close of each quarterly period, a return for the preceding quarterly period in the form prescribed by the Board, showing the total sales price of the tangible personal property sold by the retailer during the [fol. 14] preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by said act and said retailer or seller is required to accompany said return by a remittance, payable to the State Board of Equalization, of the amount of tax therein required to be collected by the retailer during the period covered by such return, and every person, storing, using or consuming tangible personal property, purchased from a retailer who does not maintain a place of business in the State of California or is not an authorized tax collector, is required, on or before the fifteenth day of the month following the close of each quarterly period, to file with the Board a return for the preceding quarterly period in the form prescribed by said Board, showing the total sales price of the tangible personal property purchased by him or it during such preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by said act, and such other information as the Board may deem necessary for the proper administration of said act, and it is required that such return shall be accompanied by a remittance of the amount of tax imposed by said act during the period covered by such return. The Act further provides that, for the purpose of the proper administration of such act, and to prevent evasion of the tax and the duty to collect the same thereby imposed, it shall be presumed that tangible personal property sold by any person for delivery in this state, is sold for storage, use or other consumption in this state, unless the person selling such property shall have taken from the

purchaser, a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale. The said act (section 8) further provides for the imposition of a penalty of 10% plus interest at the rate of one-half of one per cent per month, or fraction [fol. 15] thereof, from the date on which the tax or the amount of the tax required by said act to be collected and paid, became due and payable to the state, for the failure to pay any such tax to the state or for failure to make the return of said tax as required by said act, and further provides (section 18) that if the neglect or refusal to file a return as required by said act and to pay said tax was due to fraud or an intent to evade said act, or rules and regulations thereunder, a penalty of 25% of the amount required to be paid by any person or corporation liable for such tax shall be added, plus interest, as therein provided. It is provided that all amounts determined by the said Board to be due on account of the failure or refusal of the person liable therefor, to return, and pay the same, shall become due and payable at the time of service of notice and provided that all taxes or amounts required by said act to be collected and paid to the Board on the date when the same became due and payable, shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from and after the date when the same became due and payable until paid.

The said act contains the following provisions with reference to the enforcement of said act, to wit:

Collection Procedure: Lien of Tax

"Sec. 20. In any case in which any amount required to be paid to the State in accordance with the provisions of this act, is not paid when due the board may file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount required to be paid, interest and penalty due, the name and last known address of the retailer or other person liable for the same, that the board has complied with all the provisions of this act in relation to the determination of the amount herein required to be paid and a request that judgment be entered against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people

[fol. 16] of the State of California against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in this certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled, 'Special Judgments for State Retail Sales or Use Tax.' * * *

If any retailer liable for an amount of tax herein required to be collected shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes herein required to be collected and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no amount is due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the amount of taxes herein required to be collected by the former owner, interest and penalties accrued and unpaid by any former owner, owners or assignors.

In the event that any person is delinquent in the payment of the amount herein required to be paid by him, the board may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such person, or owing any debts to such person at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, the board may proceed forthwith to collect such amount in the following manner: The board shall seize any property, real or personal, of such person and thereafter

sell at public auction such property so seized, or a sufficient portion thereof, to pay the amount due hereunder, together with any interest or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent person in writing at least ten days before the date set for such sale by enclosing such notice in an envelope addressed to such person at his last known address or [fol. 17] place of business, if any, and depositing the same in the United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county ten days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount due, including interest, penalties and costs, if any, the name of the person from whom due, and the further statement that unless the amount due, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer or other person liable for the tax in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. If upon any such sale, the moneys so received shall exceed the total of all amounts including interest, penalties and costs due the State, any such excess shall be returned to the retailer, or other person liable for the tax, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property, has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for

any reason, the receipt of such retailer or other person liable for the tax shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer or other person liable for the tax, his heirs, successors or assigns.

It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act.

[fol. 18] Arbitrary Assessments Against Consumers

Sec. 21. If any person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer maintaining a place of business in this State neglects or refuses to pay the tax imposed by this act, the board shall make an estimate based upon any information in its possession or that may come into its possession of the sales price of the property and on the basis of said estimated sales price compute and assess the tax payable by such person, adding to the sum thus arrived at a penalty equal to ten per cent thereof. All such assessments shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which the amount of tax should have been paid to the State until the date of payment. Promptly thereafter the board shall give written notice to such person of such estimate, tax and penalty, the notice to be served personally or by mail in the manner prescribed by the provisions of section 1013 of the Code of Civil Procedure."

In addition to the penalties hereinbefore referred to, the Act contains the following penalty provisions:

"Sec. 30. Any retailer or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the board, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500) for each such offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the assessment or determination of amount due required by law to be made, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300) and not more than five thousand dollars ($5,000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Sec. 31. Any violation of the provisions of this act, except as otherwise herein provided, shall be a misdemeanor and punishable as such."

It is provided by said act (section 25) that the State Board of Equalization shall have the power to make tax assessments, to make determination of the amount of taxes, penalties and interest due, to make and prescribe rules and [fol. 19] regulations relating to the administration and the enforcement of the provisions of the said act and the said Board is charged with the enforcement of the provisions of said act.

The Attorney General of the State of California is the chief legal representative and attorney for said state and for said Board and under the Constitution and laws of said state, there is vested in him the power, and imposed upon him the duty, to represent the state in the commencement and prosecution and/or to direct the institution and prosecution of suits for taxes or penalties due to the State of California and generally to represent the state as its attorney at law in the collection of taxes or other indebtedness due the State of California or to prosecute persons liable to penalties provided for in tax statutes including the said Use Tax Act of 1935, and it is expressly provided by said act (section 28) that at any time within three years after any amount required thereby to be collected has become due and payable, and any time within three years after the delinquency of any tax, the Board may bring an action in the courts of this state or any other state, or any court of the United States in the name of the People of California, to collect the amount delinquent together with penalties and interest, and that the Attorney General must prosecute such action.

The said act contains the following provisions with reference to the distribution of taxes, interest and penalties collected and to be collected under said act:

"Sec. 27. All fees, taxes, interest and penalties imposed and all amounts of tax herein required to be paid to the State under this act must be paid to the board in the form of remittances payable to the State Board of Equalization of the State of California, and said board shall transmit such payments to the State Treasurer to be deposited in the State treasury to the credit of the retail sales tax fund. [fol. 20] There is hereby appropriated, in addition to any other moneys appropriated, the sum of one hundred forty-one thousand five hundred dollars out of the 'retail sales tax fund;' of such amount one hundred thousand dollars may be expended by the Board of Equalization, twenty-five thousand dollars may be expended by the Controller, ten thousand dollars may be expended by the State Department of Finance and six thousand five hundred dollars may be expended by the State Treasurer. The balance of the moneys paid under this act and deposited in the retail sales tax fund shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds hereunder or be transferred to the general fund of the State."

The said act contains provisions relating to reassessments, redetermination of taxes paid, and refunds for erroneous or illegal payments, and expressly provides by the terms of section 29 thereof, as follows:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than sixty days after the tax or the

amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of the payment of the tax or the amount herein required to be collected and paid to the State. If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of [fol. 21] such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount."

## V

### Pertinent Rulings of the Defendants

Said State Board of Equalization did on the first day of July, 1935, promulgate and adopt rule 11, pursuant to the terms of the California Use Tax Act of 1935, which provides as follows:

"*Property Sold or Used in Interstate Commerce.*—The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.

The fact that tangible personal property is used in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. Property is deemed to be stored in this State if held in this

State for any period of time whatever following the delivery of the property to the purchaser or the termination of the interstate or foreign shipment of the property to the purchaser."

Under the construction placed upon said ruling 11, said defendants assert the right and threaten to exact and collect from plaintiff a tax upon said materials and items and each one thereof as hereinbefore specifically set forth, and unless restrained, enjoined and prohibited by an order of this court, will demand and exact from plaintiff the taxes provided under said act upon said materials and items and each one thereof.

## VI

### Claim for Taxes Due and Threat of Prosecution by Defendants

Under said act, said defendants, and each of them, claim [fol. 22] that there is due from, and payable by, plaintiff, taxes on all plaintiff's purchases of tangible personal property described in paragraph III hereof, for uses in conducting its interstate and intrastate telephone and telegraph business as hereinbefore specifically set forth, and demand payment thereof, and if the plaintiff should fail or refuse to pay such taxes so demanded, said defendants, and each of them, intend and directly and expressly threaten to, and, unless restrained by the judgment or order of this court, will, in pursuance of their said expressed intention, institute and cause to be instituted summary suits or other proceedings to compel the said payment of said tax, interest and penalties provided by said act.

Defendants, and each of them, further threaten, in accordance with the procedure laid down in said act, to cause summary process to be issued for the seizure and sale of personal property of plaintiff used by plaintiff as instrumentalities of interstate commerce in the necessary operation, maintenance and repair of its said telephone and telegraph system, and thereby plaintiff's said business will be interfered with and plaintiff will be prevented from conducting its said telephone and telegraph business to its great and irreparable damage in the sum of more than $50,000, for which damages defendants are not financially able to respond and for which plaintiff has no adequate remedy at law. Defendants, and each of them, threaten to

and will bring repeated suits against plaintiff for further quarterly installments of said tax and subject plaintiff to a multiplicity of suits and harassing litigation to plaintiff's great and irreparable damage.

## VII

### Irreparable Loss and Expense

The payment of said taxes would require plaintiff to pay [fol. 23] to said Western Electric Company, Incorporated, on or before August 14, 1936, being the time fixed by said Use Tax Act of 1935, as extended by said Board, the several large amounts of tax payment hereinbefore stated and to suffer the loss of use of such money and the earning value thereof until recovered by suit, if recoverable at all, and in order to comply with the requirements of the said act and the demands of said defendants and each thereof, it is necessary for the plaintiff to incur substantial expenses in tax accounting and in keeping records of information concerning purchases and the uses of such properties necessary to defend its rights against the imposition of such taxes and that it will be necessary to continue such accounting unless relieved from the necessity so to do and to pay such taxes by the injunction sought in this proceeding, and such expenses, if so incurred, will constitute a substantial and irreparable loss to the plaintiff.

## VIII

### The Effect of Said Tax

The imposition of said taxes upon plaintiff as hereinabove alleged under said act by said defendants, and each of them, is a violation of Article I, section 8, clause 3 of the Constitution of the United States, and Article I, section 3 of the Constitution of the State of California; said tax constitutes a direct burden on interstate commerce, contrary to and in violation of the provisions of clause 3 of section 8, Article I of the Constitution of the United States, and Article I, section 3 of the Constitution of the State of California, and effectuates the taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, sections 3 and 13 of the Constitution of the State of California.

[fol. 24] IX

Lack of Adequate Remedy at Law

Plaintiff is without a plain, speedy and adequate remedy at law in this or any other court of the United States or of the State of California, and alleges that its remedy at law in the premises is inadequate in the following particulars:

(a) The only remedial procedure prescribed by said act for the recovery of taxes paid or which may be paid by the plaintiff under said act is to make payment of such taxes under protest and bring an action for the recovery thereof within a short period of limitation, to wit, sixty days following the payment thereof, against the State Treasurer of the State of California, in a court of competent jurisdiction in the County of Sacramento, for the recovery of the amount of taxes paid under protest; that a court of competent jurisdiction in the County of Sacramento, as plaintiff believes, is a state court of competent jurisdiction, being the Superior Court of said county; that such provision of the Act is not intended to provide for an action in the federal court, and that the term "a court of competent jurisdiction in the County of Sacramento," is not descriptive of the federal court, although including within its jurisdiction, the said county; and that such provision is so uncertain and indefinite that it fails to provide plainly and unequivocally a remedy at law, available to the plaintiff in the federal court, and that such question is undetermined either by decision of the state courts or federal courts.

(b) The statutory remedy at law prescribed by said act is inadequate and incomplete in that the provisions of said section 29, hereinbefore quoted, show that in the action prescribed thereby for recovery of tax payments made under protest, interest may or shall be allowed, upon judg-
[fol. 25] ment for the plaintiff, upon the payment found to have been illegally collected, from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the State Controller, and according to said provision, the said law fails to provide for the payment of interest for the full and complete period during which the taxpayer is without the use of the amount of tax money

so paid under protest for such time within thirty days as may be arbitrarily determined by the Controller, which lack of interest payment may extend for a longer period upon any failure to deliver such warrant to the taxpayer upon the date of its issue, and that the provisions of said statute for the payment of interest on account of the wrongful collection of such tax is indefinite and uncertain; and the said law furthermore does not provide a plain and adequate remedy at law because of the failure of said provision to state whether interest shall be allowed from the date of payment of such taxes to and collection by the retailer from the purchaser or whether interest shall run and be paid only from the date of the payment of the taxes to the State Board of Equalization, and in that respect the said remedy is not plain, certain or adequate.

(c) The remedy at law which is prescribed by said act, and particularly section 29 thereof, is uncertain and does not provide a plain and adequate remedy because the same does not plainly state how and by whom payment of such taxes under protest shall be made, whether such protest shall be made by the purchaser contemporaneously with his payment of such tax to a retailer, or whether the same must be made by the retailer contemporaneously with the return and payment of such tax so collected by him to the State Board of Equalization; that a protest to be made contem- [fol. 26] poraneously with payment by the purchaser so as to avoid a waiver of right of protest or to avoid voluntary payment of such tax would necessitate a great mutliplicity of protests on the part of plaintiff in that plaintiff would be required to draw up in legal and sufficient form, a protest stating the grounds for such protest for each and every tax payment made to any such retailer, and to deliver such protest to the retailer, at such place as such retailer might reside or have his place of business, or in the event of failure so to do, according to the provisions of said law, plaintiff would waive its right to assert the illegality of said law or to assert any grounds of illegality not sufficiently set forth in a protest duly filed at the time of the payment of the tax; and that the time when the purchaser or plaintiff would actually pay said tax, when payable to the retailer, would be the time when the same was paid to the retailer and not the time when the retailer made his return and payment of the tax to the state as a tax collector for the state. Such

a procedure is and would be involved and complicated, involving a great multiplicity of protests with the attendant expense and accounting detail, and would involve expense for the employment of an attorney qualified to prepare such protests and would involve expenses of a character not recoverable under the legal remedy provided for in said act; and that said act and the said section 29 thereof, in said respects, fail to provide a plain, speedy and adequate remedy at law, and that the procedure in the respects aforesaid has not been construed by the Supreme Court of the State of California.

(d) Taking into consideration the great multitude of purchases made and which will continue to be made by the plaintiff in connection with the conduct of its said telephone and [fol. 27] telegraph business, a substantial expense in accounting, protesting and recovering by means of the prescribed statutory procedure as laid down in said act, would be involved in keeping accounts and making the calculation and claims for interest, running from the several dates of each of its numerous purchases to the time of refunds of such taxes, penalties and interest thereon, in the event of judgments for recovery thereof by the plaintiff, and such expenses would not be recoverable under the terms of said statute and would constitute an irreparable loss in a substantial amount.

(e) The statutory remedy at law prescribed by said act is indefinite and uncertain and does not provide a plain and adequate remedy for the recovery of such taxes in that said act fails to plainly prescribe whether the tax so paid under protest may be recovered only by the person making the payment directly to the State Board of Equalization, that is to say, the retailer, when he makes the payment to the Board or the purchaser, when making direct payment under a consumer's return, and in that respect the said statute has not been construed by the Supreme Court of the State of California.

(f) The said statute is further uncertain in its provision relating to the rendition of judgment, to wit, the concluding paragraph of section 29 provides that in no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid under the Act, when such action is brought by

or in the name of an assignee or retailer, or other person paying such amount, or by any person other than the person who has paid such amount, the said provision failing to state whether it has reference to the person making direct payment to the said Board, and in this respect the said act [fol. 28] has not been construed by the Supreme Court of the State of California.

(g) Plaintiff further alleges that section 27 of said act, hereinbefore quoted, requires such taxes, when collected, to be deposited in the State Treasury to the credit of the Retail Sales Tax Fund (not Use Tax Fund) and contains provisions for an appropriation for specified purposes and provides that all fees, taxes, interest and penalties collected under said act in excess of said appropriation for specified purposes shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds under said act, or be transferred to the general fund of the state; and plaintiff is informed and believes, and therefore alleges, that excepting the amount so appropriated for specified purposes, and amounts drawn for the purpose of making current refunds which are or have become due or payable, all taxes, penalties and interest so collected, are transferred and paid to the general fund of the state; that section 29 of said act provides for the satisfaction of judgment but does not authorize any of the defendants or the State Treasurer of the State of California, to pay such judgments nor is there any express provision in said act requiring the State Controller to pay the same; and no definite procedure is laid down by said act for the payment, collection or enforcement of any judgment for the recovery of such taxes against the State Treasurer, or against the State of California, or against the State Board of Equalization; that said act does not clearly provide an appropriation for the payment of any such judgment nor does it appear that the court's judgment is or shall be final authority for the payment of such judgment, but under the language of said act, refunds, if refunds embrace judgments, can only be made upon order of the State Con- [fol. 29] troller which obviously contemplates a further and separate proceeding to secure his order rather than that the judgment itself shall be authority for the payment of the refund, and in these respects, plaintiff's remedy at law is uncertain, indefinite, incomplete and inadequate.

(h) The remedy at law prescribed in said taxing act or any remedy at law available to the plaintiff under the prohibition and limitation of said act, would necessarily involve a multiplicity of actions because the only remedy available to the plaintiff is the remedy specified in said act by making each tax payment under protest and bringing suit within a short limitation period of sixty days against the State Treasurer of the State of California, to recover such tax; that litigation to finally determine plaintiff's tax liability in the premises would, according to plaintiff's experience and by the common experience in like litigation, known to the court, in all probability involve a period of time of one to two years or possibly a longer period, should such litigation require final decision by the Supreme Court of the United States, which plaintiff believes would be likely, and that in the meantime, plaintiff would be required to make great multitudes of protests and to bring numerous suits at law within sixty days after each tax payment date, and that such multiplicity of suits would involve the plaintiff in much expense, annoyance and injury which would be irreparable and thereby deny to the plaintiff a plain, speedy and adequate remedy at law.

X

Plaintiff is ready, able and willing to furnish a sufficient bond to be approved by this court in such amount and upon such terms and conditions as may be required by this court as a condition for the issuance of any temporary restraining [fol. 30] order or interlocutory injunction which may be granted herein.

Prayer for Relief

Wherefore, in consideration of all of the foregoing, and forasmuch as the plaintiff is without remedy in the premises according to either the laws of the State of California or of the United States, or under the common law and remediable only in equity in this Honorable Court, plaintiff prays as follows:

1. That upon the filing of this complaint and upon the making and filing by plaintiff of a good and sufficient bond, in form and amount approved by this Honorable Court, that there be issued forthwith an order restraining, for the per-

iod allowed by law and pending the hearing of plaintiff's motion for interlocutory injunction, the defendants, and each of them, and all persons acting under their direction or under the direction of either of them, from enforcing, proceeding to enforce or taking any measures to enforce the said California Use Tax Act of 1935, chapter 361, Statutes of 1935 of the State of California, insofar as the defendants, and each of them, may apply or attempt to apply the same to the taxation of tangible personal property purchased and to be purchased by this plaintiff, as aforesaid, from points outside of the State of California and brought into said state for storage, use or other consumption within said state by plaintiff in operating its interstate and intrastate telephone and telegraph business aforesaid, and that said defendants, and each of them, their agents, servants and employees, and all persons acting or claiming to act under their direction or under the direction of any of them, be restrained and enjoined from imposing or collecting on account thereof, any alleged taxes, penalties or interest thereon, or from commencing any prosecution or summary process against the plaintiff on account thereof, or from setting up, assessing or [fol. 31] claiming or proceeding to set up, assess or claim, any such alleged taxes, penalties, interest, claims or demands under said law.

2. To the end that plaintiff may be protected in its said business and property and saved from the hereinbefore described heavy statutory penalties and may not be subjected to a multiplicity of suits which will otherwise result, and may not suffer great and irreparable injury, loss and damage, and may be permitted to pursue and carry on said business without unlawful hindrance and obstructions, and that said property may not be subjected to illegal liens and clouds, plaintiff prays that writs of subpoena in equity issue forthwith to the defendants to this bill, and to each of them, in their respective official capacities, to appear, make and file their answer to this bill, but not under oath, answer under oath being hereby expressly waived, and that, upon due notice thereafter, hearing and determination shall be had herein by three judges of this Honorable Court, one of whom shall be a Circuit Judge as provided by law, or as provided by section 380 of Title 28 of the Code of Laws of the United States (Judicial Code section 266, amended), thereafter, that plaintiff have an interlocutory injunction

against the said defendants, and each of them, their agents, servants and employees, and against all persons acting or claiming to act under their direction, or under the direction of any of them, from proceeding to enforce said California Use Tax Act of 1935, chapter 361, Statutes of 1935, of the State of California, insofar as the defendants, or any of them, may claim that the same applies to the taxation of tangible personal property purchased, and to be purchased, by plaintiff herein as aforesaid, from points outside of the State of California, and brought into said state for storage, [fol. 32] use or other consumption in this state by plaintiff in operating its said interstate and intrastate telephone and telegraph business as aforesaid, and that said defendants, and each of them, their agents, servants and employees, and any and all persons claiming or purporting to act in behalf of any of them or each of them, be restrained and enjoined from imposing or collecting on account thereof, any taxes, penalties or interest thereon, or from commencing any prosecution or suits, or issuing any summary process against the plaintiff on account thereof, or from proceeding or attempting to set up, assess or claim any such taxes, penalties or interest against said plaintiff, pending the final determination of plaintiff's prayer for a permanent injunction.

3. That upon the final hearing and determination upon the merits and the rendition of the final judgment herein by said statutory court of three judges as provided in said section 380 of Title 28 of the Code of Laws of the United States (Judicial Code, section 266, amended), that such Honorable Court order, adjudge and decree that the said California Use Tax Act of 1935, chapter 361, Statutes of 1935, of the State of California, insofar as the same may, by the defendants, be claimed to be applicable to the taxation of tangible personal property, purchased and to be purchased by plaintiff from points outside of the State of California, and brought into said state for storage, use or other consumption in this state by plaintiff in the operation of its said interstate and intrastate telephone and telegraph business, all as hereinbefore related in this bill of complaint, imposes a direct burden on interstate commerce contrary to and in violation of the provisions of Article I, section 8, clause 3, of the Constitution of the United States, and that the imposition and collection of any tax under said law

[fol. 33] against plaintiff in the manner aforesaid, would effectuate a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and that plaintiff has no adequate remedy at law in the premises and is entitled to a permanent injunction, restraining the enforcement of said law in said respects, and that such Honorable Court further find that said law, in any attempted application, as hereinbefore alleged by defendants, and each of them, against plaintiff, be held null and void and of no effect, upon the grounds, and for the reasons set out and alleged herein, and upon such other grounds and for such other reasons as to this Honorable Court may seem just and reasonable, and may, by this Honorable Court, be found to exist and that a permanent injunction issue herein against said defendants, and each of them, their agents, servants and employees, and any or all persons acting, or claiming to act under their order or at their behest, restraining the enforcement and execution of all of said provisions of said California Use Tax Act of 1935, chapter 361, Statutes of 1935, of the State of California, and any attempt to collect said taxes and penalties thereunder against plaintiff in the manner aforesaid, and that plaintiff have such other or further relief in the premises as the nature and the circumstances of this case may require, and to such Honorable Court may seem meet, just and agreeable in equity.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[fol. 34] *Duly sworn to by C. E. Fleager. Jurat omitted in printing.*

[fol. 35] [File endorsement omitted.]

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[fol. 36] In United States District Court

[Title omitted]

Motion for Temporary Restraining Order and Application for Hearing for Interlocutory Injunction—Filed August 11, 1936

Comes now the plaintiff and, upon its verified bill of [fol. 37] complaint heretofore duly filed herein, files this,

its motion, pursuant to section 380 of the Code of Laws of the United States (Judicial Code, sec. 266, amended), for the issuance of a temporary restraining order, upon the grounds and in the manner set forth in said bill of complaint, to prevent immediate, great and irreparable injury, loss and damage, which otherwise would result to the plaintiff, before the hearing and determination of the application for an interlocutory injunction herein may be had, or notice thereof be served, particularly because of plaintiff's statutory liability to pay, on or before the 14th day of August, 1936, the taxes alleged by defendants to be due from plaintiff under certain provisions of the California Use Tax Act of 1935, chapter 361, Statutes of 1935, of the State of California, claimed herein to be unconstitutional, illegal and void; and because, in failing to so pay said taxes on or before said due date, plaintiff would become immediately liable for the gross amount of said taxes and by way of statutory penalty for a sum in addition to said total amount of said taxes, equal to 10 per cent thereof, and a further additional sum equal to one-half of one per cent thereof, calculated upon the total amount of said taxes from the day upon which said taxes become due and payable to the date of payment thereof; and plaintiff further makes this its application to this court for a hearing on this cause for an interlocutory injunction, in accordance with the prayer of said bill of complaint and in accordance with section 380 of the Code of Laws of the United States (Judicial Code, sec. 266, amended).

Dated August 11, 1936.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 38] In United States District Court

[Title omitted]

Order Noticing Necessity for Other Judges, Issuing Temporary Restraining Orders and Order to Show Cause—Filed August 12, 1936

The verified bill of complaint in the above entitled cause [fol. 39] having been presented, and a bond conditioned in

the sum of Twenty Thousand & No./100 dollars ($20,000.00), the amount fixed by this court, having been executed and the same having been approved by the court as to form and sufficiency, said petition is hereby approved.

The constitutionality of an act of the Legislature of the State of California is attacked in said petition, calling for the determination of whether or not an interlocutory injunction shall be issued, and a court consisting of three United States judges, one of whom shall be a Circuit Judge, under section 380, Title 28, of the Code of Laws of the United States (Judicial Code, sec. 266, amended) is required. The facts alleged in the petition show that immediate and irreparable injury, loss and damage will result to the plaintiff before notice can be served and a hearing had thereon. It appearing to the court that the taxes sought to be enjoined herein are due and payable on or before the 14th day of August, 1936, and unless said taxes are paid on said day or the collection thereof be enjoined by a temporary restraining order, said plaintiff will be assessed a penalty of 10 per cent of the amount of such taxes, together with interest on said amount. and that the enforcement of such penalties and interest would work an immediate, harsh and irreparable injury to the plaintiff. This restraining order is therefore granted without notice, under the provisions of section 381, Title 28 of said Code of Laws of the United States (Judicial Code, sec. 266, amended).

The defendants John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar and Ray L. Riley, as members of the State Board of Equalization of the State of California, State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, their assistants, agents and employees are hereby restrained from enforcing, proceeding to enforce or taking [fol. 40] any measures to enforce the said California Use Tax Act of 1935, chapter 361 of the Statutes of 1935, of the State of California, insofar as the defendants and each of them may apply or attempt to apply the same to the taxation of tangible personal property purchased and to be purchased by plaintiff herein, from points outside of the State of California and brought into said state for storage, use or other consumption within said state by plaintiff in conducting its interstate and intrastate telephone and telegraph business, and that said defendants, and each of them,

their agents, servants and employees, and all persons acting or claiming to act under their direction or under the direction of either of them, be, and they are hereby, restrained and enjoined from imposing or collecting on account thereof any alleged taxes, penalties or interest thereon, or from commencing any prosecution or summary process against the plaintiff on account thereof, or from setting up, assessing or claiming or proceeding to set up, assess or claim any such taxes, penalties, interest, claims or demands under said law as in said bill of complaint specifically set forth.

Let the defendants, and each of them, show cause before the court consisting of three judges as provided by said section 380, Title 28 of the Code of Laws of the United States (Judicial Code, sec. 266, amended) at the courtroom of said court at San Francisco, California on August 22, 1936, at 10:00 o'clock in the forenoon of said day, if any they, or either of them, have, why a temporary injunction should not issue as prayed for in the bill of complaint.

Let subpoenas issue directed to the defendants, and each of them, requiring them to appear and answer, as provided by the statute.

Let a copy of the bill of complaint in the above cause and a copy of this order and a subpoena be served upon Honorable Frank F. Merriam, Governor of the State of Cali-
[fol. 41] fornia, and Honorable U. S. Webb, Attorney General of the State of California.

This order signed at San Francisco, California, on the 12th day of August, 1936 at 10 o'clock A. M.

Michael J. Roche, United States District Judge.

[File endorsement omitted.]

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[fol. 42] IN UNITED STATES DISTRICT COURT

RETURN ON SERVICE OF WRIT—Filed August 19, 1936

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpoena in Equity on Frank F. Merriam, Governor of the State of California by handing to and leaving a true and

correct copy thereof together with copy of complaint with Francis Cochran, Secretary to the Frank F. Merriam personally at Sacramento, Calif., in said District on the 14th day of August, A. D. 1936.

George Vice, U. S. Marshal, by Hayden Saunders, Deputy.

[File endorsement omitted.]

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[fol. 42½] IN UNITED STATES DISTRICT COURT

RETURN ON SERVICE OF WRIT—Filed August 19. 1936

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Order to Show Cause on Frank F. Merriam, Governor of the State of California by handing to and leaving a true and correct copy thereof with Francis Cochran, Secretary to Frank F. Merriam personally at Sacramento, Calif., in said District on the 14th day of August, A. D. 1936.

George Vice, U. S. Marshal, by Hayden Saunders. Deputy.

[File endorsement omitted.]

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[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT—Filed April 7, 1937

Come Now the defendants in the above entitled cause and move the court to dismiss the plaintiff's bill of complaint on the following grounds:

I

That the bill of complaint is without equity and the juris-
[fol. 44] diction of the Federal Court does not affirmatively appear upon the face of the bill.

II

That it does not appear that the plaintiff is without adequate remedy at law, and the statement to the contrary in paragraph X of the bill of complaint is without foundation of law in view of Sec. 29 of the California Use Tax Act of 1935 providing for an action to recover such tax paid under protest.

III

That no question of public interest or necessity appears on the face of the bill and it does not appear that irreparable injury or damage will follow if the bill of injunction is not granted.

IV

That the said bill of complaint does not state facts sufficient to constitute a cause of action against defendants or either of them or to entitle plaintiff to the relief prayed for or to any relief.

Wherefore, defendants pray that the order of the court heretofore entered herein granting a temporary injunction be set aside; that said application for temporary injunction be denied and that said bill of complaint be dismissed.

Dated: April 6, 1937.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[fol. 45] Memorandum of Points and Authorities in Support of Motion to Dismiss

California Use Tax Act, Stats. of California, 1935, p. 1297;
Brown v. Maryland, 12 Wheat. 419;
Edelman v. Boeing Air Transport Co., 289 U. S. 249;
Gregg Dyeing Co. v. Query, 286 U. S. 472;
Jensen v. Henneford, — Wash. —, 53 Pac. (2d) 607;
Monamotor Oil Co. v. Johnson, 292 U. S. 86;
Pacific Tel. & Tel. Co. v. Tax Commission, — U. S. —, 56 S. C. R.
Sonneborn Bros. v. Cureton, 262 U. S. 506;

Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 Pac. (2d) 14;

Henneford v. Silas Mason Co., — U. S. —, decided March 29, 1937.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 46] Affidavit of Service by Mail

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The Undersigned being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Pillsbury, Madison & Sutro the attorneys of record of the above named plaintiff maintain an office at Standard Oil Building in San Francisco County of San Francisco, State of California; and between said two places there is a regular communication by mail; on the 7th day of April, 1937, I served a true copy of the Motion to Dismiss Bill of Complaint, Memorandum of Points & Authorities and Notice herein, to the original of which this affidavit is attached, on said last-named attorneys of record by depositing said copy on said date in the post office at the said City and County of San Francisco enclosed in a sealed envelope addressed to said attorneys at the office thereof, and prepaying the postage thereon.

Virginia Cooke.

Subscribed and sworn to before me, this 7th day of April, 1937. James J. Arditto, Deputy Attorney General.

(Endorsed:) Filed Apr. 7, 1937.

[fol. 47] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In Equity. No. 4067-R

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

v.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, Ray L. Edgar and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

[fol. 48] OPINION—Filed September 10, 1937

DENMAN, Circuit Judge:

Plaintiff, Pacific Telephone and Telegraph Company, brings a bill for injunction against the defendants, state officers, to restrain the latters' threatened enforcement of the California Use Tax (Cal. Stats., 1935, ch. 361) upon property purchased by plaintiff outside the state and shipped within for use in its communication system which system performs inextricably intermingled interstate and intrastate commerce functions.

The case was heard together with that of Southern Pacific Company v. Corbett, Equity No. 4055-S, and the material issues are identical with those presented and decided in that case. Very little separate statement is required.

The property purchased outside the state by the plaintiff is acquired from Western Electric Company, plaintiff in case 4066-L (Equity), which is a retailer maintaining a place of business in California. The bill of complaint recites allegations substantially identical with those in the Southern Pacific case as to the allocation and dedication of the property upon its purchase to interstate commerce uses, as to the purchasing, financing and accounting being carried on under rules of the Interstate Commerce Commission, and as to any "keeping or retention" of the property within the state being in itself a use in interstate commerce.

The complaint thus describes the property:

"A part of said property was purchased by plaintiff and shipped to it to various points in the State of California as

standby telephone and telegraph facilities of plaintiff for [fol. 49] its said interstate and intrastate telephone and telegraph business; and said part of said property was held and used by plaintiff as a part of its said interstate and intrastate telephone and telegraph system as such standby facilities as required in the performance of its obligations to the public as a public service company, and in the conduct of its said interstate and intrastate telephone and telegraph business * * *.

"The remaining part of said property consisted of central office switchboards, large private branch exchange switchboards, telephone cables and components of telephone and telegraph lines purchased by plaintiff and shipped to it from time to time, under respective specific orders of plaintiff, to various points in the State of California for the immediate installation and use by plaintiff forthwith upon its shipment as part of the said interstate and intrastate telephone and telegraph system of plaintiff and for use exclusively by plaintiff for its said interstate and intrastate telephone and telegraph business * * *.

"Because of the large extent of plaintiff's telephone and telegraph system so operated, it is necessary in the interest of business economy and efficient public service for plaintiff to purchase much of its supplies in large quantities in anticipation of current and recurring needs and to effect deliveries thereof to the extent reasonably possible in carload lots to the points of distribution and use, and it is necessary to have supplies to meet current requirements distributed over the entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements as well as the regular emergency requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time unavoidably arise from the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties which arise in connection with conducting such telephone and telegraph commerce and business * * *.

"All of said articles so purchased by plaintiff from said Western Electric Company, Incorporated, were and are especially designed for use in the operation and maintenance of said telephone and telegraph system, are peculiarly adapted to telephone and telegraph uses as aforesaid and are not suitable for any other use."

It is plain from the allegations of the complaint, admitted by the motion to dismiss, that the property in question here was partly "standby" or reserve material and partly material purchased for existing maintenance needs, precisely as [fol. 50] was the situation in the Southern Pacific case. Here, as in that case, the "keeping", "retention", or "storage" of the material was a use in interstate commerce preparatory to a subsequent use after physical integration in the plant.

For the reasons set out in the Southern Pacific case, the motion to dismiss herein is denied, and an interlocutory injunction granted. Findings of fact, conclusions of law and decree to be submitted by plaintiff.

William Denman, U. S. Circuit Judge. Michael J. Roche, U. S. District Judge. A. F. St. Sure, U. S. District Judge.

[File endorsement omitted.]

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[fol. 51] In United States District Court, Northern District of California, Southern Division

In Equity. No. 4055-R

Southern Pacific Company, a Corporation, Plaintiff,

v.

John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar, and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

[fol. 52] Opinion—Filed September 10, 1937

Denman, Circuit Judge:

This case involves the question whether the necessary incidental storage of materials bought by an interstate railway company for installation in the service of repair and replace-

ment under a predetermined plan for the maintenance and improvement of the service, is a use in interstate commerce. The State of California, under a general tax law applying to all persons storing within the state goods purchased without the state upon which goods no state sales tax has been paid, seeks to have included in the large number of persons subject to the statute those engaged in commerce among the states.

By the logically immediate process of federal law, the tax on these materials stored for current repairs, operation, etc., of the interstate railway is translated into the passenger fares and merchandise carriage rates of all the passengers and shippers of the thirty or forty states shipping into and out of California.[1] The persons interested in and affected by our decision, though not appearing here, are those upon whom the tax will certainly fall. Though not litigants, their interest transcends that of the corporation and its stockholders.

The Constitution gives to Congress the regulation of the management of interstate railways. If the court decides that this storage of materials is not a use in interstate commerce, then the Congress may not declare it to be or regulate it as such a use. If Congress desires to require the railways to keep in storage for current use such necessary materials it can do so only by invading intrastate activities under an [fol. 53] extension of the principles laid down in Nat. Labor Rel. Board v. Jones & Laughlin Steel Co., 81 L. ed. 563 and Edwards v. U. S. (C. C. A. 9) No. 8386, decided July 22, 1937. The delicate question of the boundary between state and federal power would seem to make proper the presence of the Attorney General of the United States, although the recent legislation requires the opportunity for his presence only where there is presented the constitutionality of a federal statute.[2]

This is a suit in equity brought before a court of three judges pursuant to section 266 of the Judicial Code [3] seeking

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[1] Taxes are, of course, taken into account in determining a carrier's operating expenses or property valuation for rate fixing purposes. See N. Y. etc., Ry., 97 I. C. C. 273; Great North. R. Co., 133 I. C. C. 1.

[2] H. R. 2260, approved August 25, 1937.

[3] Act of June 18, 1910, 36 Stat. 557, 28 U. S. C. A. sec. 380.

to have enjoined pendente lite and permanently the enforcement of a statute of the State of California, namely the Use Tax Act of 1935.[4] The defendants are the California State Board of Equalization, the individual members of the board, and the Attorney General of the state. The injunctions are sought on the grounds that the enforcement of the tax in this case will unduly burden the plaintiff's interstate commerce business contrary to the provisions of Article I, section 8, of the Federal Constitution, and that there exists for the plaintiff no adequate remedy at law.

A temporary restraining order against the enforcement of the tax has been issued. The matter is now before this court on the plaintiff's prayer for interlocutory injunction and the defendants' motion to dismiss the bill. In support [fol. 54] of their motion to dismiss the defendants contend that the plaintiff has an adequate remedy at law and that the bill states no ground of relief whatsoever.

Under the assailed tax measure, later considered in detail, the defendants seek to impose against the Southern Pacific Company an excise tax upon the "storage" or "use" of personal property purchased by the company without the State of California, shipped to points within the state and there held, in accordance with predetermined plans, to be installed and made an active part of the company's tangible equipment used within the state for purposes of its inextricably interwoven interstate and intrastate commerce.

The Southern Pacific Company is a corporation of Kentucky engaged as a common carrier by railroad in seven states, including California. Half of its more than 8,000 total mileage is in California. Its gross operating revenue for the calendar year 1935 was more than $124,000,000 of which $63,000,000 was earned on California business. Of this latter figure over $34,000,000 was attributable to interstate commerce.

The specific personal property against the use of which the excise is sought to be enforced consists of a great variety of material necessary for the conduct of plaintiff's intermingled interstate and intrastate business. A portion of it was purchased for integration in plaintiff's railroad system pursuant to an existing maintenance program for the year 1936. The remainder was acquired to have on hand for the recurring demands of maintenance and emergency require-

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[4] Cal. Stats., 1935, ch. 361.

ments. Among other articles the property purchased included rails, frogs, switches, valve oil, lumber, stationery [fol. 55] and tools. The complaint alleges that the greater portion was specifically designed for use in the operation, maintenance and repair of the road, or "peculiarly adapted to railroad uses * * * and * * * not suitable for any other use." The articles were all required for the efficient and economical conduct of the road.

Concerning the interstate commerce purposes of these purchases, the complaint alleges:

"Said purchases were made by the plaintiff through the use of its operating capital consisting of money or current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor are in due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act, and that all of said items of tangible personal property so purchased by the plaintiff were devoted to the service of transportation immediately upon their purchase and that upon the purchase of said articles they immediately became a necessary and indispensible part of working capital, material, supplies, equipment and instrumentalities for the operation of said railroad and the said articles and each and all of them became, were and are instrumentalities used indiscriminately and inseparably in the operation, maintenance and repair of plaintiff's railroad for conducting interstate transportation and intrastate transportation from the time the same were purchased therefor, and any storage, use or consumption thereof, which occurred within the State of California cannot be separated or segregated as between intrastate and interstate transportation, the said railroad contemporaneously carrying by means of the same organization and facilities, both intrastate and interstate commerce and said items and materials being from the time of purchase outside the State of California inextricably devoted to and used in service of both classes of commerce."

And further:

"• • • that prior to any keeping or retention of said materials within the State of California, said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

The gravamen of these allegations is thus perceived to be that any "keeping" or "storage" of the property within [fol. 56] the state is a use of the property in interstate commerce preparatory to a subsequent use by way of actual physical consumption.

During the three months ending June 30, 1936, the property described in the complaint, purchased outside of and shipped into California, amounted to $1,590,190.62. The use tax assessed on this material totals $47,705.72.

The Act in question imposes an excise tax of three per cent of the sale price upon the storage, use or other consumption of tangible personal property within the state.[5] Leaving out of account the alleged character of the properties as instrumentalities of interstate commerce, the plaintiff's exercise of uses incidental to ownership over them within the state comes within the broad definitions of the statute.[6]

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[5] Cal. Stats., 1935, ch. 361.

"Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.

"Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act • • •."

[6] Sec. 2 • • •

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

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[fol. 57] Exempt from the operation of the tax are materials protected from excise by the Federal or State Constitution, and material upon which the California three per cent sales tax has been paid.[7] Thus it is observed that the use tax is complementary to the sales tax, being designed to reach purchasers who acquire personal property in other states.

If the property taxed is purchased from a retailer maintaining a place of business within the State of California, the purchaser pays the tax to the retailer and the latter pays it to the State Board of Equalization. If the retailer maintains no place of business within the state, the purchaser pays the board directly. In either case returns and payments are due quarterly (sections 6, 7).

In the event of non-payment the board may file with any county clerk a certificate showing due determination of the tax and the failure to pay. Upon such filing the county clerk is required to enter a judgment for the state against the delinquent. The judgment is subject to execution in the usual manner, and in addition it becomes a lien upon any real property owned by the delinquent within the county (section 20). In addition to this procedure, the board is empowered [fol. 58] to bring an action in any court of competent jurisdiction to recover the tax at any time within three years after it becomes due (section 28).

The taxpayer is afforded but one remedy to recover taxes illegally exacted. He may pay under protest and bring an action in the state court.[8]

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[7] "Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

"(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

"(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

* * * * * * *

[8] "Sec. 29. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer

[fol. 59] The bill alleges that the defendants will, unless restrained, take summary action to collect the more than $40,000 alleged to be due upon the property purchased during the quarter ending June 30, 1936. It further states that like or greater amounts of property will be purchased during quarter years to come. Temporary and permanent injunctions are asked against future exactions as well as the claim for the second quarter of 1936.

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thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than sixty days after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of payment of the tax or the amount herein required to be collected and paid to the State.

"If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

"In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount."

The defendants' motion to dismiss raises questions which have narrowed to two: (A) Does there exist for the plaintiff an adequate remedy at law? (B) Is the threatened exaction void for repugnance to the Federal Constitution?

(A) We hold that the plaintiff has no adequate remedy at law.

Plaintiff presents several reasons to support its contention that, if the tax is unconstitutional, it has no adequate legal remedy. It will be necessary to consider only one of the grounds urged, which ground, in our opinion, is controlling.

The Use Tax Act provides but one forum for the recovery by suit at law of taxes paid under protest (Section 29, note 8, supra). This forum is "a court of competent jurisdiction in the county of Sacramento". Obviously this provision contemplates a suit only in the state court.

When a bill in equity is brought in a federal court, the test of the adequacy or lack of adequacy of the remedy at law is the legal remedy afforded in the federal court. Where no legal remedy exists in that forum, the remedy at law is inadequate. This conclusion is impelled by a consideration of the nature of the right to sue in the federal courts. It is a substantial constitutional right. Arrowsmith v. Gleason, 129 U. S. 86. When one has a cause of action at law, and [fol. 50] there exist requisites of federal jurisdiction, his remedy at law is the right to sue in the state or federal tribunal at his election. To deprive him of this choice materially impairs the completeness and adequacy of his remedy.

In Smyth v. Ames, 169 U. S. 466, 515, 516, 517, a statute of Nebraska set up a board to prescribe maximum railroad rates. Any railroad deeming itself aggrieved was permitted to bring an action in the supreme court of the state to show that the rates fixed were unjust. If the state court sustained the contention of the railroad it was authorized to issue an appropriate order to the board requiring a correction of the inequity.

Suit was brought by a railroad company in the United States District Court to enjoin the enforcement of the statute. The Supreme Court of the United States held that a case of equity jurisdiction was made out, saying:

"• • • The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any

ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. * * * 'A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts'."

In Chicago, B. & Q. Ry. v. Osborne, 265 U. S. 14, 16, a railroad company brought suit in the federal court to restrain the collection of taxes levied by the State of Nebraska which taxes were alleged to be unjustly discriminatory. The state law provided a remedy by writ of error to the Board of Equalization from the supreme court of the state. In holding that the taxpayer was authorized to seek federal equity relief, the United States Supreme Court said:

[fol. 61] "If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. * * *. But the writ of error, of course, can be sued out only in the State, and a remedy in the State Courts only has been held not to be enough. Smyth v. Ames, 169 U. S. 466, 516. St. Louis-San Francisco Ry. Co. v. McElwain, 253 Fed. 123, 136. Franklin v. Nevada-California Power Co., 264 Fed. 643, 645."

The principle was reaffirmed in Risty v. Chicago, etc. Ry. Co., 270 U. S. 378, 388:

"* * * the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. Smyth v. Ames, 169 U. S. 466; Chicago B. & Q. R. Co. v. Osborne, supra."

(B) We hold that the tax sought to be levied upon the plaintiff is an unconstitutional burden on interstate commerce.

The tax in question is laid upon the exercise of certain rights of ownership over personal property; these rights

being enumerated in the broad statutory definitions of "use" and "storage" (footnote 6, supra). It is not an ad valorem property tax, admittedly valid although the property consist of instrumentalities of interstate commerce, nor is it a tax on the privilege of doing an intrastate business, upheld in Pacific Telephone Co. v. Tax Commission, 297 U. S. 403.

The plaintiff does not urge constitutional objections other than the contention that the enforcement here will unduly burden interstate commerce. And even under this heading there can be no objection to the excise on the ground that the materials were imported into the state before the incidence of the tax. Henneford v. Silas Mason Co., 300 U. S. 577.

The question narrows, then, to the issue whether at any time after their importation into the State of California, [fol. 62] the materials purchased by the plaintiff were not in use in interstate commerce. If they at all times were in actual interstate commerce use or intermixed interstate-intrastate commerce use, that use cannot be subjected to a state tax. It is well settled that such a tax constitutes a forbidden burden on interstate commerce. Helson and Randolph v. Kentucky, 279 U. S. 245, 249, 252; Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 628; Cooney v. Mountain States Tel. Co., 294 U. S. 384, 393.

By their motion to dismiss the defendants admit the facts pleaded in the complaint. That is, they admit that the items of property they seek to tax "were devoted to the service of transportation immediately upon their purchase," that their financing and accounting was carried on "according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act," that each item was an essential and vital factor in the maintenance and repair of plaintiff's interstate commerce plant, that at all times since their purchase "said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

Thus defendants admit the factual contention that plaintiff's use of the purchased materials at all times since their purchase was a vital use in interstate commerce. Never-

theless they urge that as a matter of law the only interstate commerce use which is free from state taxation is use by way of actual physical consumption or use occurring after the materials have been installed in the operating plant, such as the gasoline being consumed in the Helson and [fol. 63] Bingaman cases, or the telephone instruments actually installed in the Cooney case.

The statute specifically exempts property protected from taxation by the Constitution. While this does no more than declare what already is the law, it demonstrates the solicitude of the legislature toward the recognition of constitutional limitations. It indicates that when the legislature defined taxable storage and use it was anxious to insure that interstate commerce use would be protected. Yet defendants would have the statute read:

"(a) 'Storage' means and includes any keeping or retention in the State * * * of tangible personal property (when such keeping or retention is an inseparable part of the use of such property in interstate commerce, when such property is allocated and dedicated to interstate commerce from the moment of its purchase and is recognized by the Federal Government through the Interstate Commerce Commission as a portion of the capital of the taxpayer used in interstate commerce) * * *."

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property (which exercise of right or power is a part of the use of such property in interstate commerce prior to a subsequent use by way of consumption) * * *."

We do not believe the statute is thus to be construed. However, if this is the meaning of the act, then we are forced to conclude that it is an unconstitutional exertion of power by the state legislature.

This conclusion is impelled by a realistic approach to the facts presented by the bill. In Pacific Telephone Co. v. Tax Commission, 297 U. S. 403, 413, the Supreme Court, dealing with the validity of a state tax, repeated its earlier admonition in Gregg Dyeing Co. v. Query, 286 U. S. 472, 480: "The question of constitutional validity is not to be determined by artificial standards."

Whether a use in storage for current consumption is a [fol. 64] use in interstate commerce is a question of ultimate

fact. Here the court must find or refuse to find this ultimate fact upon the admitted facts and upon those of which it takes judicial notice. It cannot use "artificial standards." It must consider actual business and industrial concepts.

The question is analogous to that presented by a merchandising company's stock for sales in the current season, stored for daily supply of its counters. If such storage is a use other than a merchandising use, what use is it? Or take the case of a canner's stock of cans stored in his plant at the beginning of a fruit season from which stock there is daily withdrawn those required for the arriving fruit. What sort of use is the storage of these cans, if not a canning use?

Certainly any merchandiser or canner or other industrialist or business man would consider it a glaring example of the application of an "artificial standard" to say that such a storage for current consumption was not a use in the business or industry in question. He might well answer: What other business have I in which that storage has any use?

When we view realistically the facts set out in the bill, supplemented with our judicial notice of the practical necessities of a large transportation enterprise, we clearly per- [fol. 65] ceive that this property is used in interstate commerce from the time of its purchase.

Consider first the property purchased for and devoted to a sole, fixed and predetermined use in an existing interstate commerce maintenance program. The storage of such property is a use which is as integral a part of the interstate commerce project as are the rails over which interstate trains are actually running. It is the definite predetermined character of its purpose that makes the storage of these purchased articles of equipment as vital to the entire plant before installation as well as afterwards. The situation differs materially from that of the purchase of a body of goods a part or all of which will, in the ordinary turn of events, be used in the future in interstate commerce operations.[9]

It is no answer to say that the plaintiff might change its intention after purchasing and use the property for some purely intrastate purpose not intended at the time of pur-

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[9]See Nashville, Chattanooga & St. Louis Ry. v. Wallace, infra.

chase. Granting that such legal right exists, it would be as persuasive to argue that the state might tax the use of an interstate locomotive in operation on the theory that its owner is privileged to use it at any time for a purely local purpose. The question concerns not what the plaintiff might do; it concerns, rather, what the plaintiff is actually doing.

Likewise, property purchased for the sole, fixed and predetermined purpose of serving as "standby" or reserve [fol. 66] equipment in an interstate commerce plant is employed in interstate commerce from the time of its purchase. It is almost axiomatic that the far flung system of an interstate railroad cannot be conducted without the presence of reserve supplies. Unpredictable events requiring replacement and repair are of daily occurrence. A flood washes out a section of track. Can it rationally be argued that the rails and ties held in readiness against this emergency are not an integral portion of the company's interstate commerce equipment? One might as well contend that a derail switch is not in use in interstate commerce until an emergency requires it to function.

The distinction which the defendants would have us make between property before and property after installation, whether purchased for an existing necessity or as reserve, strikes us as no more cogent than the argument that the use of a railway station could be taxed because for long periods no interstate trains stop in front of it and no interstate passengers or freight make use of it; or the argument that the use of a locomotive is taxable by the state during the period in which it is standing idle between interstate trips, or that the telephones held non taxable in the Cooney case, supra, should be subject to excise because there were long periods when no interstate calls were being made on any one of them.

In short, a use by way of storage or retention of materials can be fully as vital to interstate commerce as a subsequent use by way of consumption or after installation. A somewhat similar situation is presented by a require- [fol. 67] ment of pilotage fees which a vessel leaving or entering a harbor must render to a pilot whether or not it avails itself of his services. Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450.

The Federal Government has recognized the interstate character of the use of materials like those described in the complaint through regulations (having the force of law) issued by an administrative agency, the Interstate Commerce Commission.[10] We do not believe that the California Legislature, specifically declaring in section 4 of the Act (note 7, supra) its intention to recognize the constitional prohibition against the taxation of the use of materials in interstate commerce, intended nevertheless to subject to taxation the use of materials not only set apart by the carrier for interstate commerce uses, but recognized as so devoted by the Federal Government.

In a case calling for the determination of whether a particular use of materials is an intrastate or an interstate use, we touch upon the boundary between state and federal power. The requirement of materials for current repairs [fol. 68] and replacement is so obviously a necessity for interstate commerce that no legislation has been needed to compel it. However, the Congress could well pass a statute requiring that:

"Interstate carriers shall purchase and store for current repairs necessary materials for the efficient conduct of their railways, said *usage* by said carriers of said materials awaiting current installation to be maintained in places convenient to the places of their installation."

To illustrate how our decision in this case may affect the scope of federal power, we assume that the above statute

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[10] I. C. C. classification of accounts for steam railroads:
"716. Material and Supplies.

"This account shall include the balances representing the cost, less depreciation, if any, of all unapplied material such as road and shop materials, articles in process of manufacture by the accounting company, fuel, stationery, and dining car and other supplies. In determining the cost of material and supplies suitable allowances shall be made for any discounts allowed in the purchase thereof.

"NOTE.—Balances representing the cost of unapplied construction material and supplies located at the point of use, which have been purchased for projected new roads and extensions, are provided for in road and equipment account No. 47, 'Unapplied construction material and supplies'."

has been passed. In opposition to it we have the instant state use tax act which the defendants would have read:

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose * * * of tangible personal property (including materials purchased and stored by interstate carriers for current repairs and maintenance necessary for the efficient conduct of their railways) * * *."

The power delegated to Congress under the commerce clause is paramount to the reserved power of the state, when the two come in conflict. Minnesota Rate Cases, 230 U. S. 352, 399; National Labor Relations Board v. Santa Cruz Fruit Packing Co., (C. C. A. 9) decided July 31, 1937. Hence in such a conflict of opposing authority presented by the statutes pictured above, this court would be required to indulge every presumption in favor of the Congressional determination that the usage of materials described in both statutes was a use in interstate commerce. Ogden v. Saunders, 12 Wheat. 213, 269. Such determination being a reasonable hypothesis, we would be required to accept it as true. Against it the state statute would necessarily fall as invalid. It is because of this possible conflict that we cannot [fol. 69] apply the Bushrod Washington doctrine of Ogden v. Saunders to the state tax legislation challenged in this case.

Conversely, when the state acts within the scope of its reserved powers every presumption is indulged in favor of the validity of its legislation. Such was the case in Pacific Gas & Electric Co. v. Sacramento Municipal Utility District, No. 8500, recently decided by the Circuit Court of Appeals for the Ninth Circuit.

In support of their contention that the materials in question here are subject to the use tax, the defendants rely strongly on the case of Nashville Ry. Co. v. Wallace, 288 U. S. 249, 261, 266. In that case the railroad brought suit in a Tennessee court for a declaratory judgment holding unlawful an excise tax of that state levied upon the storage and withdrawal from storage of gasoline.

The railway purchased the gasoline from points outside the state, brought it into Tennessee and stored it in private tanks. Subsequently all of it was withdrawn from storage to be used as a source of motive power in interstate railway

operations. The company assailed the tax both on the ground that the gasoline while stored was still a subject of interstate commerce and on the ground that because of its subsequent use as fuel, the tax was in effect a tax upon the use of the fuel in interstate commerce. The Supreme Court affirmed the highest court of Tennessee in decreeing that the tax was valid. In answer to the railway's first contention it said (p. 266):

"The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. * * * The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced."

In answer to the argument that the tax was one in effect upon the use of gasoline in interstate transportation, it [fol. 70] was held (p. 267):

"We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, *subsequent* to the incidence of the tax as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power * * *.

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its *prospective* use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock, or other instruments of interstate commerce, which are subject to local property taxes." (Emphasis supplied.)

Here the Supreme Court makes a finding of ultimate fact that the storage was not a use in interstate commerce. The admitted probative facts in that case upon which the

finding of ultimate fact was made are not the same as in the instant case. In the case at bar the admitted fact is that the storage is an immediate and not a "prospective use" in interstate commerce.

It is plain from the above quotation that the Supreme Court did not have before it for decision in the Nashville case the question whether or not the gasoline stored was already set apart, devoted, and predetermined for use in interstate commerce before it entered the state. We have studied exhaustively not only the opinion of the Supreme Court but also the record and briefs in that case. Nowhere do we find that the gasoline upon entering the State of Tennessee or upon its deposit in the storage tanks was allocated, set apart, and dedicated to interstate commerce uses. Nowhere do we find contention or proof that the stored gasoline was a part of the railroad's current operating in- [fol. 71] ventory, recognized as such by the Federal Government. It was nowhere argued that the gasoline while in the tanks was being used in interstate commerce. As we have already indicated, property is not exempt from state use taxation merely by virtue of the fact that in the ordinary turn of events it will be used in interstate commerce, or the fact that subsequently all of it has been so used. In each case there must be facts, admitted or proved, which show that the keeping or retention is in itself a use in interstate commerce.

What we have said of the Nashville case is equally true of Edelman v. Boeing Air Transport, 289 U. S. 249, 251, 253. In that case the taxpayer purchased gasoline within and without Wyoming and stored the same in tanks at its Wyoming airports. It was subsequently withdrawn, some for local sale, some for local use, and some for fueling the taxpayer's interstate airplanes. Wyoming levied an excise tax on the use of gasoline, the incidence of the tax falling on the withdrawal from storage. The taxpayer objected to paying the excise on the fuel withdrawn for interstate planes. The Supreme Court held against the taxpayer, saying that the ruling facts of the case were identical with those in the Nashville decision.

Our examination of the Edelman decision reveals that, as in the Nashville case, there was neither contention nor proof made that the gasoline taxed was set apart or allocated by the taxpayer to an interstate use before it was actually being consumed in the planes; nor any evidence

that it was in any way brought under the jurisdiction of the Interstate Commerce Commission. The case is even weaker than the Nashville decision, in view of the fact that when the gasoline was put in storage only an indefinable [fol. 72] part of it was subsequently to be used in interstate commerce.

We hold, therefore, that the Nashville and Edelman cases are not controlling on the facts alleged in this complaint. The facts alleged and admitted here bring this case within the principle of the Helson, Bingaman and Cooney cases. In this view it is unnecessary to consider whether the authority of the Nashville and Edelman cases is weakened by Graves v. Texas Co., 298 U. S. 393, 401, wherein it was held, without mentioning the Nashville and Edelman decisions, that a state tax levied on the withdrawal of gasoline from storage for delivery to the United States was void as being an exaction against the activities of the Federal Government.

Reaching a conclusion similar to that of the District Court for Washington, in construing like provisions of a use tax of that state,[11] we hold that the defendants may not constitutionally enforce the provisions of the California Use Tax Act against the plaintiff upon the property set out in the complaint.

The defendants are at liberty, of course, to put the plaintiff to proof of its allegations of present use of the materials as alleged in the bill. And nothing in this opinion bears upon the right of a state to levy a tax upon the intrastate use or property such as that in issue here, under any formula calculated reasonably to apportion the inter- [fol. 73] state and intrastate commerce uses.

The motion to dismiss the complaint is denied. Plaintiff will be awarded an interlocutory injunction. Plaintiff will prepare and file proposed findings of fact, conclusions of law, and decree.

William Denman, U. S. Circuit Judge. Michael J. Roche, U. S. District Judge. A. F. St. Sure, U. S. District Judge.

[File endorsement omitted.]

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[11] Northern Pacific Ry. v. Henneford, 15 Fed. Supp. 302.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE FOR INTERLOCUTORY INJUNCTION—Filed November 16, 1937

This cause came on regularly for hearing pursuant to order to show cause issued on the 10th day of July, 1936, on plaintiff's verified complaint and motion for interlocu-[fol. 75] tory injunction, and the court having considered the record, pleadings, and files herein, and the argument of counsel, and the opinion of the court having been filed on September 10, 1937, and the court's findings of fact and conclusions of law having been filed on the 16th day of November, 1937, and the court having found and concluded therein that plaintiff is entitled to an interlocutory injunction as prayed for,

Now, therefore, it is hereby Ordered, Adjudged and Decreed as follows:

1. Pending the final determination of this action and until the further order of this court, the defendants John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar and Harry B. Riley, as members of the State Board of Equalization of the State of California, State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, and each of them, their successors, and any and every person acting or attempting to act under and by virtue of the authority of the California Use Tax Act of 1935, Chapter 361 of the Statutes of the State of California for 1935, and acts amendatory thereto, and all persons to whom notice of this injunction shall come, be and they are hereby enjoined and restrained from threatening, attempting, or proceeding to enforce or to take any steps to enforce said California Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California, as against the plaintiff herein, or any of its agents, servants and employees, on account of any claim that said California Use Tax Act applies to the taxation of tangible personal property purchased or to be purchased by plaintiff at points outside of the State of California, and brought into said state for use, and at all times used, in said State of California by plaintiff in its inextricably intermingled interstate and intrastate telephone and tele-

[fol. 76] graph commerce and business, and they and each of them are further enjoined from imposing or collecting on account thereof any taxes, penalties, or interest thereon, or from commencing any prosecution of suits or issuing any summary process against the plaintiff on account thereof, or from proceeding or attempting to set up, assess, or claim any such taxes, penalty, or interest against the plaintiff on account of any such purchases.

2. This decree and injunction shall become effective and operative upon the filing by the plaintiff of a bond in a form required by law, in the sum of $160,000, to be approved by this court, and upon the filing of such bond, the bonds heretofore filed by plaintiff as required by the temporary order heretofore entered will be exonerated and discharged.

3. When any further payments under the California Use Tax Act of 1935 shall become by the terms thereof due and payable by said plaintiff, then upon the filing of a good and sufficient bond approved by the court or any judge thereof in an amount agreed upon between the parties to the cause, said interlocutory injunction shall be extended to the enforcement of said act as to any such payment, and if the parties fail to agree on the amount of such additional bond, any of the parties may move the court to take any action which he or they may desire.

And whereas an action is pending in this court entitled "Western Electric Company, Incorporated, v. John C. Corbett, et al.," Equity No. 4066L, involving the applicability of the California Use Tax Act of 1935 to the use, storage, or other consumption of tangible personal property purchased by the plaintiff herein from said Western Electric Company, Incorporated, and the tax involved in that action is a duplication of the tax involved in this action, and the defendants can enforce the collection of such tax, if liability [fol. 77] therefor is found to exist, either from said Western Electric Company, Incorporated, or from the plaintiff herein, but not from both,

Now, Therefore, it is further Ordered that a bond given by and on behalf of said Western Electric Company, Incorporated, and the plaintiff herein, covering the liability of either said Western Electric Company, Incorporated, or the plaintiff herein, whichever shall be found liable on account

of said tax, shall be accepted as a proper bond in the premises.

Dated November 16, 1937.

William Denman, United States Circuit Judge.
Michael J. Roche, United States District Judge.
A. F. St. Sure, United States District Judge.

Approved as to form, as provided in Rule 22, and as to amount of bond, superseding stipulation dated October 4, 1937.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

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[fol. 78] In United States District Court

[Title omitted]

Answer to Bill of Complaint—Filed September 30, 1937

Come Now the defendants above named and answering the bill of complaint on file herein admit, allege and deny as follows:

[fol. 79]

I

Defendants admit the allegations found in paragraph I of said complaint except that defendants deny that plaintiff could not discontinue its said intrastate commerce and business without being compelled to withdraw from its interstate commerce and business.

II

Defendants admit the allegations found in paragraph II of said complaint on file herein, except that said defendants deny that the tax imposed under the Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California constitutes a tax upon the use of said materials in carrying on interstate telephone and telegraph commerce and business, or that said tax constitutes a tax and burden upon the privilege of using said materials in conducting interstate telephone and telegraph commerce and business or that said tax is a burden on interstate and foreign com-

merce, contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States, or that the imposition or collection of said tax effectuates a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, as alleged in paragraph II of said complaint.

III

Defendants admit the allegations found in paragraph III of the complaint on file herein except that defendants deny that said property was held and used by plaintiff as a part of its interstate and intrastate telephone and telegraph system or that the central office switchboards, telephone tables, etc. were shipped to various points in the State of California for the immediate installation and use by plaintiff forthwith upon its said shipment as part of the said interstate a- intrastate telephone and telegraph system of [fol. 80] plaintiff or that said property was forthwith, upon its arrival, installed and used by plaintiff as part of its interstate and intrastate telephone and telegraph system or that no part of said property was stored in the State of California for any period of time whatsoever or that said materials so distributed and held for such uses referred to in pa.agraph III of said complaint and the process for distribution and the holding thereof for such uses are inseparably and essentially a part of the conduct and operation of such telephone and telegraph commerce and business, or that all of said articles so purchased by plaintiff from said Western Electric Company, Incorporated, were and are especially designed for use in the operation and maintenance of said telephone and telegraph system, or that said articles are peculiarly adapted to telephone and telegraph uses or that said articles are not suitable for any other use, all as alleged in paragraph III of said complaint.

Further, defendants deny that all of said items of tangible personal property so purchased by plaintiff from said Western Electric Company, Incorporated, were devoted to the telephone and telegraph service immediately upon their purchase, or that upon the purchase of said articles they immediately became a necessary and indispensable part of working capital, materials, supplies, equipment and instrumentalities for the operation and conduct of such telephone

and telegraph business or that the said articles and each and all of them became, were and are instrumentalities used indiscriminately and in common, in and for the operation and maintenance of said telephone and telegraph system for conducting said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business from the time the same were purchased therefor, all as alleged in paragraph III of said complaint.

[fol. 81] Further defendants deny that said articles of tangible personal property underwent no storage of any character intervening between the ending of the interstate transportation thereof which followed the purchase of said items of property and the time when the same, and each thereof, were allocated and dedicated to uses in the conduct of said interstate and intrastate telephone and telegraph business by plaintiff, or that at all times from the purchase of said materials until the use thereof by plaintiff, said materials were, and each item thereof was, devoted, dedicated and set apart exclusively for use in such inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, or that any keeping or retention of said materials or any item thereof within the State of California was and is an inseparable part of the use thereof in such inextricably intermingled interstate and intrastate commerce, all as alleged in paragraph III of said complaint.

IV

Defendants admit the allegations found in paragraph IV of said complaint on file herein.

V

Defendants admit the allegations found in paragraph V of said complaint.

VI

Defendants admit the allegations found in paragraph VI of said complaint.

VII

Defendants admit the allegations found in paragraph VII of said complaint.

[fol. 82]

VIII

Defendants deny that the imposition of said taxes upon plaintiff as alleged in said complaint under the said act, as

the same is, and has been construed and applied by said defendants, and each of them, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States and Article I, Section 3, of the Constitution of the State of California or that said tax constitutes a direct burden on interstate and foreign commerce, contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article 1, Section 10, Clause 2, of the Constitution of the United States, or that the tax is a taking of plaintiff's property without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, and Article I, Sections 3 and 13, of the Constitution of the State of California, as alleged in paragraph VIII of the said complaint on file herein.

IX

Defendants admit the allegations found in subdivision (a) of paragraph IX of the complaint on file herein, but deny all the remaining allegations of paragraph IX of said complaint on file herein.

As a separate, further and distinct answer, defendants allege as follows:

I

That subsequent to the date that the tangible personal property referred to in the bill of complaint on file herein was purchased, and at all times prior to the date when said [fol. 83] property was installed, after interstate transportation of the property had ended, the property was not used in plaintiff's interstate telephone and telegraph commerce and business, or in plaintiff's inextricably intermingled intrastate and interstate telephone and telegraph commerce and business.

II

That subsequent to the time that plaintiff purchased, outside of the State of California, the said property, and after the interstate transportation of said property into the State of California had ended, the said property was stored in the State of California and placed in plaintiff's private warehouse, or on plaintiff's private property for some period of time prior to the date that plaintiff actually installed said property in its telephone and telegraph commerce and business or actually used the same in its in-

extricably intermingled interstate and intrastate telephone and telegraph commerce and business.

III

That plaintiff, after the interstate transportation of said tangible personal property had ceased, and after the property was stored at points in the State of California, and subsequent to the date of installation of the same into plaintiff's interstate telephone and telegraph commerce and business, used or will use all of said property in conducting its inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

IV

That the State Board of Equalization has demanded payment of the use tax from plaintiff for the privilege of storing said property in the State of California after interstate [fol. 84] transportation of the same has ended and prior to installation of the same, and further for the privilege of using the property in its intrastate telephone and telegraph commerce and business only; that the amount of the tax was not increased because plaintiff used the property in its interstate telephone and telegraph commerce and business.

V

That the plaintiff at the time of the shipment of said tangible personal property from points of origin did not arrange a destination for the property other than plaintiff's points of storage in the State of California.

VI

That plaintiff was free to use the property in its telephone and telegraph commerce and business or for any other purpose after transportation had ceased and the property was stored in the State of California.

Wherefore, defendants pray that plaintiff take nothing by its action herein, that the Bill of Complaint be dismissed, for costs of suit, and for such further relief as the court may deem meet and proper in the premises.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

Receipt of copy of the within Answer admitted this 30 day of September, 1937.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF FACTS—Filed December 21, 1937

In addition to the facts alleged in the bill of complaint which are admitted by defendants' answer, it is stipulated [fol. 86] that the following are admitted facts. Hereinafter the use of the present tense indicates a continuous course of action during all of the times material to the issues in this case.

Plaintiff's Telephone and Telegraph Business and Operations

1. The plaintiff's interstate and intrastate telephone and telegraph commerce and business are inextricably intermingled. Plaintiff's interstate and intrastate telephone and telegraph system includes plant and equipment sufficient to enable it to render efficient and economical telephone service according to the demand of the public for such telephone service, including both interstate and intrastate service. It is not feasible, economically or practically, for a corporation engaged, as the plaintiff is, in an inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, to provide separate state-wide telephone and telegraph systems, one for the interstate business and the other for the intrastate business of such corporation.

2. Plaintiff's interstate and intrastate telephone and telegraph system, and all of plaintiff's capital (with relatively small exceptions not material to this action), including plant and operating capital, are exclusively devoted inextricably and indiscriminately to interstate and intrastate telephone and telegraph service, commerce and business, the same plant, facilities and organization being devoted indiscriminately to and used indiscriminately in such

interstate and intrastate service. Reference hereinafter in this stipulation to plaintiff's "telephone and telegraph system" and to plaintiff's "telephone and telegraph business" means and is reference to plaintiff's telephone and telegraph system devoted inextricably and indiscriminately to interstate and intrastate telephone and telegraph service, [fol. 87] and to plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

Purchases of Property on Account of Which Tax is Claimed to be Due

3. In the necessary operation, maintenance and repair of its telephone and telegraph system, plaintiff purchases from Western Electric Company, Incorporated, hereinafter called "Western Electric," large amounts of tangible personal property consisting of equipment, apparatus, materials and supplies for use as integral parts of and exclusively in and in common for its interstate and intrastate telephone and telegraph commerce and business. Plaintiff purchases all of said tangible personal property in accordance with the purposes, plan and methods hereinafter described in paragraphs 12, 13, 14, 15, 20, 21 and 22 hereof, and for the sole and exclusive purpose of making it a part of plaintiff's said telephone and telegraph system and of using it indiscriminately and in common in and for the conduct of plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, and of doing and performing all of the acts and things with respect to such property, including holding and retention thereof in the State of California, which are hereinafter described. Said purchases are made at points outside the State of California, and said equipment, apparatus, materials and supplies are shipped in interstate commerce by Western Electric to plaintiff at various points in the state.

General Classes of Property Involved

4. The tangible personal property involved in this action is of two general classes: goods purchased on specific orders for installation at a particular place and to serve a particular purpose in the plaintiff's telephone and telegraph [fol. 88] system, hereinafter called "specific order equipment"; and goods purchased from time to time for holding

as stand-by facilities to meet fluctuating demands and emergencies resulting from changes in the public demand for service and to make repairs necessitated by the casual destruction of plaintiff's property, etc., hereinafter called "stand-by facilities."

Amounts of Purchases and of Tax Claimed to be Due on Account Thereof

5. During the quarterly periods of three months which ended respectively June 30, 1936, September 30, 1936, December 31, 1936, March 31, 1937, June 30, 1937, and September 30, 1937, plaintiff purchased from Western Electric at points outside the State of California tangible personal property of the character hereinabove described for the total sales or purchase price of $5,034,669.86. The respective amounts of the purchase price of the specific order equipment, the stand-by facilities, and the total tangible personal property so purchased by plaintiff from Western Electric during said six quarterly periods, and the respective amounts of the total tax claimed by defendants to be due on account thereof under the terms of the Use Tax Act of 1935 of the State of California, are as follows:

| Quarter ending | Price of specific order equipment | Price of stand-by facilities | Total price of tangible personal property | Tax claimed to be due |
|---|---|---|---|---|
| June 30, 1936..... | $435,062.00 | $116,387.00 | $551,469.00 | $16,544.07 |
| Sept. 30, 1936..... | 1,631,653.00 | 11,488.00 | 1,643,141.00 | 49,294.23 |
| Dec. 31, 1936..... | 569,801.00 | 56,433.00 | 626,234.00 | 18,787.02 |
| Mar. 31, 1937..... | 471,135.21 | 103,000.33 | 574,135.54 | 17,224.07 |
| June 30, 1937..... | 825,327.56 | 40,235.76 | 865,563.32 | 25,996.90 |
| Sept. 30, 1937..... | 745,530.00 | 28,597.00 | 774,127.00 | 23,223.81 |

[fol. 89] Purchase of Equipment Through Use of Operating Capital, and Devotion to Telephone and Telegraph Service

6. All of the articles of tangible personal property hereinabove described are purchased by plaintiff through use of operating capital, consisting of money or current assets definitely devoted to the telephone and telegraph service, or through the credit of plaintiff as a telephone and telegraph company engaged in such telephone and telegraph service.

7. All of said articles of tangible personal property hereinabove described are necessary to the efficient and economic operation of plaintiff's telephone and telegraph sys-

tem, and the purchases thereof are made in the manner hereinafter described and at the times and in the amounts necessary to meet the needs of plaintiff's telephone and telegraph business. Plaintiff considers said articles from the time of their purchase as a part of plaintiff's said telephone and telegraph system and as instrumentalities devoted to the operation and conduct of plaintiff's telephone and telegraph business.

8. Plaintiff engages in no business other than its said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business. The said articles, by reason of their nature, and by reason of the purpose for which and the particular specifications by which they are manufactured, as hereinafter described, are not, after their purchase by plaintiff from Western Electric, as hereinabove described, readily or practically salable by plaintiff to other persons, and plaintiff does not divert and has no practical way of diverting any of said articles to any use other than their intended use in plaintiff's said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

[fol. 90] Accounting

9. Plaintiff keeps the accounts of its said telephone and telegraph business according to the accounting rules and regulations and the uniform system of accounts for telephone companies promulgated and prescribed by the Federal Communications Commission. The uniform system of accounts contains telephone plant accounts, described as follows:

"Telephone Plant Accounts

20. Purpose of telephone plant accounts.—(A) The telephone plant accounts (201 to 277, inclusive) are designed to show the original cost (note instruction 3-S. 1) of the company's telephone plant (note instruction 3-BB) which ordinarily has a service life of more than 1 year, including such plant whether used by the company or others in telephone service (note instruction 3-AA); also the original cost of franchises, patents, rights of way, leaseholds and other interests in land. It shall also include the general expenses of organization of the accounting company."

and operating expense accounts, described as follows:

"Operating Expense Accounts

60. Purpose of operating expense accounts.—The operating expense accounts (602.1 to 677 inclusive) are designed to show the expenses of furnishing telephone service (note instruction 3-AA), including expense of maintaining the plant used in such service. (Note also instructions 4, 5, and 6.)"

Telephone plant accounts include, among others, accounts of central office equipment, station apparatus, station installation, pole lines, aerial cable, buried cable, aerial wire, underground conduit, and furniture and other office equipment. Typical of the specifications for these accounts are the specifications for the central office equipment account, which are as follows:

"221. Central office equipment.—(A) This account shall include the original cost (note instruction 3-S.1) of electrical instruments, apparatus, and equipment, other than station equipment, in central offices (including terminal and test rooms), repeater stations and test stations used in transmitting traffic and operating signals, and similar equipment in operators' schools and other centralized locations.

[fol. 91] (B) This account shall also include the original cost of operators' chairs, wire chiefs' tools, desks and tables equipped with central office telephone equipment, and other furniture, fixtures, and equipment designed specifically for use in central offices, repeater stations, etc., or installed as a part of the electrical equipment therein. (See also note A to this account.)

Items

[Note instruction 8]

Aisle—lighting equipment.
Balconies for distributing frames.
Banks—connector, selector.
Batteries.

[Here follows continuation of alphabetical list of items of equipment.]"

The operating expense accounts include, among others, a number of repair accounts. Typical of the specifications for these repair accounts are the specifications for the account of repairs of pole lines, which are as follows:

"602.1. Repairs of pole lines.—This account shall include the cost of repairing pole lines and the cost of maintaining right of way therefor.

[Here follows list of items.]"

The uniform system of accounts also prescribes an account of material and supplies, described as follows:

"122. Material and supplies.—(A) This account shall include the cost of unapplied material and supplies held in stock, including plant supplies, tools, fuel, stationery, directory paper stock, and other supplies; and material and articles of the company in process of manufacture for supply stock."

10. Immediately upon the purchase of the articles of tangible personal property hereinabove mentioned they became and are subject to accounting in the manner and form hereinabove described.

Specific Order Equipment

11. Specific order equipment consists of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, [fol. 92] central office cable, wire, protectors and other component parts of telephone and telegraph lines.

Specification of Equipment to Meet Particular Need

12. The plaintiff orders all of the specific order equipment for immediate installation in the manner hereinafter described in paragraphs 16 and 17 hereof at particular points in plaintiff's telephone and telegraph system and to serve particular purposes and needs in the system. Plaintiff purchases equipment of this class for four general purposes: (1) to meet the public demand for telephone and telegraph service in territories in which plaintiff is operating and offering such service, in accordance with plaintiff's obligations as a corporation engaged in and rendering telephone and telegraph service, (2) to improve existing

service, as part of a service improvement program, (3) to render existing service at less cost, as part of a general economy program, and (4) to make plant changes necessary to maintain the efficiency of plaintiff's system, and to conform to changes in public ways, rights of way, and public requirements. The plaintiff periodically makes an estimate of its equipment needs for the purposes above mentioned. This estimate is based upon (1) a survey by plaintiff's commercial department of the expected growth of telephone business in each locality and in connection with each exchange, (2) an estimate by plaintiff's traffic engineers of the equipment necessary to take care of the growth of business and to fulfill plaintiff's service improvement and economy programs, and (3) an estimate by plaintiff's equipment engineers of the actual equipment specifications to fill the equipment needs found by the traffic engineers. As a matter of practical economy, such an estimate provides for the least practical quantities of equipment required for the [fol. 93] particular purpose to be served.

13. To meet a need thus disclosed at a particular point and for a particular purpose in plaintiff's telephone and telegraph system, plaintiff's engineers draw up a "project" containing the equipment specifications and cost necessary to fulfill this need in the most efficient and most economical manner, and in the manner best calculated to serve the public. Plaintiff's equipment engineers reduce the project to its detailed specifications—the number of frames, the number and type of switches, size and arrangement of trunk groups, etc.—with supplemental explanatory drawings. The project, if it involves a large expenditure, is then submitted to plaintiff's executive officers and board of directors for approval and authority to make the expenditure; if the expenditure is small, the project is submitted to some other designated official of plaintiff.

14. When a project is thus approved and the necessary expenditure authorized, plaintiff's engineers prepare an order or "requisition," and forward it to Western Electric. In the case of central office equipment and private branch exchange switchboards, the requisition is accompanied by the detailed specifications and drawings.

**Special Manufacture**

15. Western Electric manufactures specially—i. e., makes to order and according to plaintiff's particular specifications as to each article of equipment—central office switchboards, large private branch exchange switchboards, large underground cables, switches, frames, cable racks, etc., thus ordered by plaintiff. It may manufacture specially, or may take out of existing stock, items such as central office cable, wire, and protectors. By far the larger part of the specific [fol. 94] order equipment is not manufactured by Western Electric until it receives orders therefor, and is then manufactured according to plaintiff's particular specifications as to each article of equipment; and its stock of other equipment is manufactured after receipt from plaintiff of a "preview" of anticipated orders, which, when they are given, can be filled out of such stock. All of the specific order equipment is especially designed for use in the operation of a telephone and telegraph system, and is peculiarly adapted to telephone and telegraph uses and is not suitable for any other use.

16. A single exception to some of the statements of fact hereinabove contained exists in the following particular: the category of specific order equipment includes a small number of exchange telephone poles (which are of a different specification, size and weight, being larger and heavier, than are toll poles and other exchange poles which are purchased by plaintiff for, and are peculiarly adapted to, plaintiff's own exclusive use as aforesaid) with the plan and for the purpose of using them, under joint pole agreements, jointly with power companies, light companies, etc., for carrying plaintiff's telephone and telegraph wires and also the wires of such other companies. The purchase and use of joint poles in this manner is an ordinary and customary practice in the conduct of a telephone and telegraph business such as that of the plaintiff. Plaintiff receives payment from such other company or companies for the right and interest of such other company or companies in and to their joint use of such joint poles. Plaintiff's use of such joint poles is exclusively for and in the conduct of its interstate and intrastate telephone and telegraph commerce and business as aforesaid, and is by means of crossarms and other

equipment peculiarly adapted to telephone and telegraph uses as aforesaid and not suitable for any other use.

[fol. 95] Installation of Specific Order Equipment

17. Specific order equipment, after the termination of the interstate shipment thereof, is installed either by plaintiff's employees or by experts in the employ of an agency hired by plaintiff to make specific installations. In either case, plaintiff orders and Western Electric arranges delivery at times which not only are appropriate to the desired time for completion of each installation project but also coincide with times when the installers will be available to make the installation. Western Electric ships the goods, when ready, by public carrier, consigned to plaintiff at the place of use. When plaintiff is informed that the goods have arrived, plaintiff sends its trucks to be at the dock or railroad car at the time when, as plaintiff is informed, the goods will be ready for delivery and available for unloading. Plaintiff's representative receipts for the goods at the dock or breaks the seal of the railroad car, as the case may be, and plaintiff's employees unload the goods directly from the dock or car into the trucks. Generally the trucks are driven directly to the building in which the equipment is to be installed; but in handling some kinds of equipment in large metropolitan centers, for reasons of economy in trucking, the equipment is sometimes carried first to a distributing center and there reloaded into other trucks which carry it to the building in which it is to be installed. The equipment is then moved directly from the truck into the building to the place of installation. On the arrival of the equipment at the place of installation, the installers commence installation immediately and the installation is a continuous process, except as this statement is qualified by the matters stated in the next paragraph.

18. There is no holding, in any warehouse, storeroom or [fol. 96] other like place of deposit, of any of the specific order equipment after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such equipment is retained or held in the possession of the plaintiff and is not in motion in the course of installation thereof, occur between the time of termination of the interstate shipment thereof and the time when the installation of such equipment is completed and said equipment is available, as physically connected parts of

plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from the dock or car and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. In practically all installation projects the process of connecting parts of the equipment with and into plaintiff's physical plant is under way before the gathering of all equipment involved in the project at the place of connecting the same with said plant is complete. There is no retention or holding of any of said equipment except such as necessarily occurs in the ordinary and efficient course of transporting said equipment to its ultimate destination and installing it as physically connected parts of plaintiff's telephone and telegraph plant.

With reference to private branch exchange switchboards only, in exceptional instances it occurs that a subscriber orders such a switchboard for installation at a particular time, and that, because of construction delays and for like [fol. 97] reasons, the place where such switchboard is to be installed is not ready when plaintiff receives such switchboard at the end of the interstate shipment thereof. Plaintiff then holds such switchboard at some convenient place until the place of installation is ready, and then installs the same as hereinabove described. The period of such holding, in the experience of plaintiff, rarely exceeds a few days.

Accounting of Specific Order Equipment

19. When plaintiff receives specific order equipment from Western Electric, as hereinabove described, plaintiff's accounting department, pursuant to the said accounting rules and regulations and uniform system of accounts for telephone companies, charges to its repair accounts (being accounts of plaintiff's expenses of operating its said interstate and intrastate telephone and telegraph system, as hereinabove described) the cost of such part of the equipment as is installed in plaintiff's plant for the purpose of making repairs, and to its appropriate plant accounts (being accounts of plaintiff's capital devoted to the telephone

and telegraph service, as hereinabove described) the cost of such part of the equipment as constitutes new additions in plaintiff's telephone and telegraph system.

Stand-by Facilities

20. In the interest of prompt and efficient public service and in the performance and discharge of its obligations to the public as a corporation engaged in and rendering telephone and telegraph service, plaintiff is required and compelled to have supplies to meet current requirements distributed over its entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and [fol. 98] emergencies which result from changes in the public demand for service and the repairs which from time to time are unavoidably made necessary by the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties and ordinary wear and tear which occur in connection with conducting its telephone and telegraph commerce and business.

21. Stand-by facilities purchased by plaintiff from Western Electric at points outside the state consist of small private branch exchange switchboards, teletypewriter equipment, cable, loading coils, poles, crossarms, wood conduits and a small amount of copper wire. Private branch exchange switchboards and teletypewriter printers comprise by far the largest part of the stand-by facilities. All of such stand-by facilities are especially designed for use in the operation of a telephone and telegraph system, and are peculiarly adapted to telephone and telegraph uses and are not suitable for any other use.

Ordering of Stand-by Facilities

22. To replenish supplies of stand-by facilities, plaintiff's supply department places orders with Western Electric approximately once a month. As a matter of practical business economy, plaintiff thus orders periodically only such quantities of stand-by facilities as it determines to be necessary in the conduct and operation of its said telephone and telegraph business and system to meet current requirements, emergency demands, repairs, and wear and tear, as above stated.

## Receipt, Distribution and Maintenance of Stand-by Facilities

23. Western Electric ships such stand-by facilities by carrier, consigned to plaintiff at central points of its telephone and telegraph system. When notified of the arrival [fol. 99] of the goods, plaintiff sends trucks to pick them up at the dock or railroad depot. Plaintiff's employees unload the goods directly into the trucks and carry them, in accordance with the needs and purposes for which they were ordered, to the places where plaintiff keeps stores of such stand-by facilities, or in some instances, for reasons of economy in trucking, to a distributing center, there to be reloaded into other trucks which carry them to the places where plaintiff keeps stores of stand-by facilities. After the termination of the interstate shipment of such stand-by facilities, and upon their arrival at the said places where plaintiff keeps its stores of stand-by facilities, plaintiff retains and holds them in said stores as stated in the next paragraph.

24. Plaintiff retains and holds and keeps on hand, in storage space provided by it in the State of California at strategic points—i. e., at points suitable for prompt distribution of stand-by facilities as needed—over its entire telephone and telegraph system, private branch exchange switchboards and teletypewriter equipment, and small stores of poles, cable and loading coils. Plaintiff keeps its stores of such materials in quantities necessary to meet current requirements and the constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time are unavoidably made necessary by the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties and ordinary wear and tear which occur in connection with conducting plaintiff's telephone and telegraph business.

25. The distribution by plaintiff of stand-by facilities to stores located at strategic points over plaintiff's telephone and telegraph system, and the holding of such stand-by facilities in these stores, as hereinabove described, is neces- [fol. 100] sary to insure the rendition by plaintiff, as efficiently and as free from interruption as possible, of interstate and intrastate telephone and telegraph service.

Installation of Stand-by Facilities

26. When repairs become necessary to any part of plaintiff's telephone and telegraph system, plaintiff's employees who are charged with making such repairs take out of plaintiff's stores such of said stand-by facilities as are necessary to make the repairs. When any person makes a demand for a private branch exchange switchboard or for teletypewriter equipment, supplies of this nature are taken out of plaintiff's stores on disbursement tickets to meet service orders. Plaintiff's installer-repairmen take these supplies out of the stores, take them to the place where they are needed and make the necessary installation.

27. Between the time when said stand-by facilities are taken from plaintiff's stores as above described and the time when the installation of such facilities is completed and said facilities are available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public, time intervals occur during which such facilities are retained or held in the possession of the plaintiff and are not in motion in the course of installation thereof; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from plaintiff's stores and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. After such stand-by facilities are taken from plaintiff's stores [fol. 101] as above described, there is no retention or holding of any of said facilities except such as necessarily occurs in the ordinary and efficient course of transporting said facilities to their ultimate destination and installing them as physically connected parts of plaintiff's telephone and telegraph plant.

Accounting of Stand-by Facilities

28. When plaintiff receives such stand-by facilities from Western Electric, as hereinabove described, plaintiff's accounting department, pursuant to the said accounting rules and regulations and uniform system of accounts for telephone companies, charges the cost thereof to its "Ma-

terials and Supplies" account. Upon taking such supplies from its stores, plaintiff credits them to its said "Materials and Supplies" account, and charges them to its repair accounts if they are installed in plaintiff's plant for the purpose of making repairs, or to the appropriate plant accounts if they constitute new additions in plaintiff's plant.

Installation and Use (Facts Common to Specific Order Equipment and Stand-by Facilities)

29. The installation of all of said equipment, facilities, apparatus and materials is for the sole purpose of making said articles available as physically connected parts of plaintiff's telephone and telegraph plant for carrying interstate and intrastate communications for the public, and is necessary to that end.

30. In accordance with said accounting rules and regulations and uniform system of accounts, plaintiff charges the cost of carrying said articles by truck from the dock or railroad to the place of installation (including the cost of use of the trucks and the wages of the truckmen) and the cost of installation (including the wages of plaintiff's employees engaged in installation and the amounts paid to installers [fol. 102] hired from time to time) to its appropriate repair accounts or plant accounts as a part of the cost of said repairs or additions to plant.

31. When said articles of tangible personal property are physically connected with the plaintiff's telephone and telegraph plant they become and are a part of the facilities by which plaintiff's subscribers, and others who avail themselves of the telephone and telegraph service offered by the plaintiff, command at their pleasure the service they desire, whether interstate or intrastate; and all of said articles of tangible personal property, including specific order equipment and stand-by facilities, when the same are available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public, are used by plaintiff exclusively in and for the operation and maintenance of plaintiff's telephone and telegraph system and indiscriminately and in common in and for conducting its inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

**Necessity of Paying Tax Out of Operating Capital and Charging to Operating Expense Accounts and Plant Accounts**

32. If the tax, the collection of which is sought by this action to be enjoined, should be paid, said tax would be paid out of plaintiff's capital devoted to the telephone and telegraph service as hereinabove stated, and would be a charge to plaintiff's operating expense accounts or plant accounts as part of the cost of the tangible personal property on account of which such tax should be paid, and which cost is charged to plaintiff's operating expense accounts and plant accounts as hereinabove described If said tax should be required to be paid, it would be a charge to and become a [fol. 103] cost of conducting plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

33. By reason of its inextricably intermingled interstate and intrastate commerce and business plaintiff is compelled to purchase from Western Electric, at points outside the State of California, a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate telephone and telegraph business. This is true because (1) a substantial quantity of plaintiff's equipment, such as pole lines between the state lines and cities near the border of California, and direct wires running from central offices and toll offices in large municipalities in California to large municipalities in other states, together with the portions of switchboard and other equipment connected therewith, are used for carrying interstate communications only and handle no intrastate business, (2) the amount of a large part of the central office equipment and other equipment which plaintiff necessarily maintains and operates in the conduct and operation of its telephone and telegraph business as aforesaid, is determined by the amount of traffic, including both interstate and intrastate telephone and telegraph communications, which it bears, and (3) plaintiff is informed and believes that some undetermined part of its equipment is necessarily maintained and operated in order to serve subscribers and patrons who would not demand or request telephone and/or telegraph service unless interstate as well as intrastate service were held out by plaintiff to such subscribers and patrons.

34. Notwithstanding that none of the property aforesaid was, is or will be used exclusively and separately by the

plaintiff in conducting intrastate telephone and telegraph [fol. 104] business, but that all of it is used as hereinbefore stated, defendants have demanded of the plaintiff the taxes aforesaid, under the provisions of Ruling No. 11 of the defendant, said State Board of Equalization, promulgated on or about February 6, 1936, which said ruling is as follows:

"The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.

The fact that tangible personal property is used in this State in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State."

35. It is understood that in making this stipulation of evidential facts, defendants do not stipulate as an ultimate fact, that the articles involved herein were in interstate use in plaintiff's operation and conduct of its telephone and telegraph commerce and business prior to their physical installation in plaintiff's telephone and telegraph plant and system and/or their consumption in conducting telephone and telegraph commerce and business, it being expressly understood that the time when interstate use commenced is a matter of ultimate fact or mixed conclusion of law and fact to be determined by the court.

It is further understood by and between the parties hereto that this stipulation is a stipulation of facts only, and that neither party hereto is stipulating to conclusions of law, and that both parties hereto are entitled to draw such inferences from the facts herein stipulated, or such con- [fol. 105] clusions of law, as they may be so advised.

Dated December 21, 1937.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff. U. S. Webb, Attorney General; H. H. Linney, by James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 106] In United States District Court, Northern District of California, Southern Division

Equity No. 4067-R

The Pacific Telephone and Telegraph Company (a Corporation), Plaintiff,

v.

John C. Corbett et al., Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

Opinion—Filed May 4, 1938

Denman, Circuit Judge:

The stipulation of facts filed herein supports the essential allegations of the bill of complaint.

The material, the storage use of which defendants seek to tax, consists (1) of specific order equipment including central office switchboards, frames, switches, cables, wires [fol. 107] and other essential components of telephone and telegraph transmission; and (2) reserve or "stand-by" facilities of the sort just described which must be kept on hand in sufficient quantities to meet emergencies and new demands.

The principles governing the taxation of the use of this material are identical with those applicable in Southern Pacific Co. v. Corbett, No. 4055-R (Filed May 3, 1938). For the reasons stated in our opinion in that case, we conclude that the bill herein must be dismissed.

We find the facts to be as stipulated and agreed by the parties. From those facts we conclude that the threatened enforcement of the California Use Tax Act will not impose a direct or undue burden on plaintiff's interstate commerce business.

The permanent injunction is denied and the bill dismissed.

William Denman, United States Circuit Judge.
Michael J. Roche, United States District Judge.
A. F. St. Sure, United States District Judge.

May 4, 1938.

[File endorsement omitted.]

[fol. 108] In United States District Court, Northern District of California

In Equity. No. 4055-R

Southern Pacific Company, a Corporation, Plaintiff,

v.

John D. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar, and Harry B. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

Opinion—Filed May 3, 1938.

Denman, Circuit Judge:

This case has been submitted under an agreed statement of facts which sustains the pertinent allegations of the bill discussed in our opinion denying the motion for its dismissal. 20 Fed. Supp. 940. The railway has established [fol. 109] that the storage use of the railway materials, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, is a use in interstate commerce. Hence a tax upon such use is a tax affecting an interstate commerce use—that is, affecting the federal as distinguished from any state function performed by the railway as a public carrier. At the hearing we invited further argument and briefing, but the able presentation on behalf of the State has not answered the question, "In what enterprise other than the intercommingled interstate and intrastate railroading is this use in storage for current repairs and replacements, without which the railroad could not operate?" Such storage use for current installation is use in interstate commerce in any realistic sense understood by industrialists and *and* merchants, (20 Fed. Supp. 943), and could be regarded otherwise only by the application of some "artificial standard" prohibited by Gregg Dyeing Co. v. Query, 286 U. S. 472, 480.

However, since our denial of the motion to dismiss, the Supreme Court has decided three cases dealing with the boundaries of state and federal taxation. Two of them, Western Live Stock v. Bureau of Revenue, 82 L. ed. 548, and Coverdale v. Arkansas & Louisiana Pipe Line Co., decided April 4, 1938, significantly expand the area of the states. A third, Helvering v. Mountain Producers Corp., 82 L. ed. 607, explicitly overrules long established concepts determining the respective taxing areas of both governments.

[fol. 110] It is suggested by the state's officers that since the thirteenth paragraph of that decision states:

"* * * In the light of the expanding needs of the State and Nation, the inquiry has been pressed whether this conclusion has adequate basis; whether in a case where the tax is not laid upon the leases as such, or upon the government's property or interest, but is imposed upon the gains of the lessee, like that laid upon others engaged in similar business enterprises, there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income."

Helvering v. Mountain Producers Corporation, 82 L. ed. 607, 611,

we may be required to reconsider our decision with a view to the expanding needs for revenue of the State of California, and they offer the enactment of the use tax itself as evidence of such need.

In the present emergency of dependent unemployed, California's need for revenue is of sufficient pressure to produce incandescence, but the emitted light does not show where the path of such a principle of determination will lead us.

What light we have on various interstate railways, performing a National public service as important in the body politic as the circulation of blood in the individual, seems to disclose correspondingly "expanding needs" for revenue to meet their expanding payrolls and interest on debt and, here, expanding taxes. Indeed, so pressing are their needs that only by the expanding use of federal funds is their federally regulated function prevented from transfer to federal courts and federal receivers. Already, for many railways, it has been transferred.

[fol. 111] We cannot believe that the language of the Mountain Producers case must be interpreted as imposing on us, first, a determination of the need for state taxation, and, if found, second, a reconsideration of our decision on the denial of the motion to dismiss with a view to a reversal of our holding there. Such a criterion would suggest another review and other overrulings if returning prosperity contracts rather than expands the state's need.

We prefer the alternative view of the state's brief that, just as the emergency of the depression and high rentals in the so-called Rent Cases, Block v. Hirsh, 256 U. S. 135; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, and Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, and also in the much later case of Home Building and Loan Asso. v. Blaisdell, 290 U. S. 398, induced the Congress and the Judiciary to the exploration of hitherto unused constitutional powers, so now the urgency of the more recently expanding functions of government in aid of the economic and social needs of the average man, also made poignantly clear by the world depression, requires both legislatures and courts to review the border line between state and federal taxing areas, as that was decided in cases when no such economic and social conditions existed or had been exposed.

Prior decisions considered in the overrulings by the Mountain Producers case present a more definite guide for determining its effect on the decision of this case. Among the cases considered is Indian Oil Co. v. Oklahoma, 240 U. S. [fol. 112] 522, holding invalid as an unconstitutional burden on a governmental function a tax on Indian land leases owned by the taxpayer. Here the tax was on the property itself of the taxpayer.

In three other cases, the income of the taxpayer from his leases is held not taxable. In Choctaw & Gulf R. R. v. Harrison, 253 U. S. 292, was held invalid a state tax on the lessee of a mine from the trustee of the mine for Choctaw and Chickasaw Indian tribes, wards of the federal government, based upon his gross sales of his coal. The court held that the lessee was "the instrumentality through which this (governmental) obligation is carried into effect". Such an agency cannot be subjected to an occupation or privilege tax by a state".

In Gillespie v. Oklahoma, 257 U. S. 501, the state tax on the income of leases owned by the taxpayer was held invalid on the same reasoning, as was the federal tax on the income of the owner of state leases in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393.

In all these cases the tax on the taxpayer's property or his income incidental to its ownership is regarded as potentially destructive of the governmental function served by the taxpayer in the exercise of its ownership.

In the Mountain Producers case the tax was upon the income from the leases, and the court states the overruling principle to be:

"* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no suffi- [fol. 113] cient ground for holding that the effect upon the Government is other than indirect and remote. We are convinced that the rulings in Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171, supra, and Burnet v. Coronado Oil & Gas Co. 285 U. S. 393, 76 L. ed. 815, 52 S. Ct. 443, supra, are out of harmony with correct principle and accordingly they should be, and they now are, overruled."

Helvering v. Mountain Producers, supra, 613.

However, preceding this sentence regarding taxation on such income is another stating the broader principle permitting taxation on property of private persons, formerly regarded as having the character of governmental agents because of their leases or contracts with the government. This statement is so significantly joined by the word "and" to the succeeding above quoted sentence, that we are constrained to believe it to be the broader ratio decidendi of the case. The preceding sentence is (pp. 612, 613):

"These decisions in a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for *his property* or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effect." (Emphasis supplied.)

If, then, the private person dealing with the federal government with reference to his property is subject to state taxation, an occupation tax on that person in the use of his property would seem equally valid.

If this be so, the principle established is inconsistent with that controlling in Graves v. Texas Co., 298 U. S. 393, 401, [fol. 114] cited by the Railway as controlling here. There a contractor agreed to sell gasoline to the government. It was his property until delivery to the government. Prior to delivery it had to be stored and withdrawn from storage. He was taxed by the state of Alabama for this use of storage and withdrawal while still his property.

The court in the Graves case states that this tax increases the government's cost by the amount of the tax levy. However, it seems clear that because the increased cost is so measurable, the principle is no different from the sales tax on the coal in the Choctaw case. It is just as certain that the government will receive less for the coal lease as that it will pay more for the gasoline. One is no more direct than the other. Both are levied on the owners of gasoline and coal while the government has no title in either.

Shortly before the Mountain Producers decision was that in Western Live Stock v. Bureau of Revenue, 82 L. Ed. 548. There a non-discriminatory tax on gross receipts from the sale of advertising in a periodical printed in one state and circulated in that and in other states is held valid as on an intrastate activity. The fact that it increases the cost of producing advertising, which has its value because of its interstate circulation, is not controlling.

The latest of these tax cases, decided April 4, 1938, follows normally the trend of these decisions. In Coverdale v. Arkansas & Louisiana Pipe Line Co. the party taxed was engaged in the interstate delivery of petroleum gas through a pipe line. It maintained several pumps in the [fol. 115] state of Louisiana, the power from which traveled interstate with the gas it moved. The state levied an occupation tax on the use of the pumps, measured by the amount of power going into an intermingled intra and interstate distribution. The court held that because (1) the tax was non-discriminatory and (2) the pump itself was stationary within the state and itself did not move with the power it created, the tax on its use did not have a direct effect on interstate commerce and hence was a valid exercise of the state's right to tax.

When California's use tax on the Railroad is considered in connection with the principles established in the preceding cases, we are compelled to the conclusion that the reasoning on which we distinguished it from the cases of Nashville etc. Ry. v. Wallace, 288 U. S. 249, and Edelman v. Boeing Air Transport Co., 289 U. S. 249, is not controlling. It is true that the standby material here stored for the necessary maintenance of a great interstate railway is dedicated to an interstate use, but so are the pumps in the Coverdale case. Railways could not run unless their spare parts and maintenance supplies were used in the storage from which they were currently drawn, but neither could the gas and oil be driven in interstate commerce unless the owner used the pumps.

For the purposes of this case the dividing line is the same as in the Nashville and Edelman cases, even though in those cases there was no proof that the fuel was dedicated to an exclusive use to create power in interstate transportation. It is that the storage use and withdrawal use are prior to the actual installation of the parts and rails [fol. 116] in the locomotive and cars and in the roadbed. Until then the increased cost, although it is paid by the passengers and freight owners, is an "*indirect*" burden on interstate commerce. Did not the Coverdale case seek to distinguish between the Nashville and Edelman cases and Helson v. Kentucky, 279 U. S. 345, we should be inclined to hold that the latter case was overruled and, though a direct burden, the tax was as valid as the direct ad valorem tax on the railroad's property itself. In logic, as pointed out by Mr. Justice Stone in his concurrence in the Helson case, the one is as justifiable a method of collecting from the railway what it owes the state government for its services in state governmental protection, as is the other.

We find the facts to be as stipulated and agreed by the parties. From those facts we conclude that the threatened enforcement of the California Use Tax Act will not impose a direct or undue burden on plaintiff's interstate commerce business.

The permanent injunction is denied and the bill dismissed.

William Denman, United States Circuit Judge. Michael J. Roche, United States District Judge. A. F. St. Sure, United States District Judge.

May 3, 1938.

[File endorsement omitted.]

[fol. 117] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS—Filed June 6, 1938

[fol. 118] This case came on for hearing on defendants' motion to dismiss the bill of complaint and to dissolve the interlocutory injunction issued herein, and on plaintiff's application for a permanent injunction. Notice of hearing of plaintiff's application for a permanent injunction was duly given in accordance with section 266 of the Judicial Code (United States Code, Title 28, sec. 380). The plaintiff appeared by its counsel, Pillsbury, Madison & Sutro, by Francis N. Marshall, Esq., and defendants appeared by Honorable U. S. Webb, Attorney General of the State of California, by H. H. Linney and James J. Arditto, Deputies Attorney General. The court having heard the parties and their counsel, and having considered plaintiff's verified bill of complaint and defendants' answer, together with defendants' motion to dismiss the bill of complaint and to dissolve the interlocutory injunction and plaintiff's application for a permanent injunction, and having rendered its opinion that plaintiff's application for a permanent injunction should be denied and the bill of complaint be dismissed, makes the following findings of fact and conclusions of law which constitute the grounds of its order denying the plaintiff a permanent injunction herein and dismissing the bill of complaint, as follows:

Findings of Fact

1. Plaintiff is and at all times pertinent to the issues in this action was a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen and a resident of said State of California.

2. For many years last past and at all times pertinent to the issues in this action plaintiff has been and now is a telephone and telegraph company engaged exclusively in interstate and intrastate telephone and telegraph commerce and business.

[fol. 119] 3. At the time of the commencement of this action the defendant John C. Corbett was a citizen and resident of the State of California, residing in San Francisco in

said state; the defendant Fred E. Stewart was a citizen and resident of the State of California, residing in the City of Oakland in said state; the defendant Richard E. Collins was a citizen and resident of the State of California, residing in the City of Redding in said state; the defendant Ray L. Edgar was a citizen and resident of the State of California, residing in the City of San Diego in said state; and the defendant Ray L. Riley was a citizen and resident of the State of California, residing in the City of Sacramento in said state, and said persons constituted the State Board of Equalization of the State of California.

During the pendency of this action the defendant Ray L. Riley resigned as a member of said State Board of Equalization and Harry B. Riley, a citizen and resident of the State of California, was appointed by the Governor of the State of California as Controller of said state and ex-officio member of said State Board of Equalization, and the said Harry B. Riley, as a member of said State Board of Equalization, has been duly substituted as a defendant herein, and his appearance has been duly entered herein.

During the pendency of this action the defendant Ray L. Edgar died and William G. Bonelli, a citizen and resident of the State of California, was appointed by the Governor of the State of California as a member of said State Board of Equalization in his place and stead, and the said William G. Bonelli, as a member of said State Board of Equalization, has been duly substituted as a defendant herein, and his appearance has been duly entered herein.

The State Board of Equalization of the State of California, as constituted at the time of the commencement of this action and as now constituted by the resignation of the said [fol. 120] Ray L. Riley and the appointment of the said Harry B. Riley, and by the death of said Ray L. Edgar and appointment of said William G. Bonelli, was at all times pertinent to this action and now is an official board, organized and existing under and by virtue of the Constitution and laws of the State of California.

The defendant U. S. Webb at the time of the commencement of this action was and now is a citizen and resident of the State of California, residing in the City and County of San Francisco, and was and is duly elected, qualified and acting Attorney General of the State of California.

4. Western Electric Company, Incorporated, at all times pertinent to this action was and now is a corporation duly

organized and existing under and by virtue of the laws of the State of New York, and a citizen and a resident of said State of New York. Said company at said times maintained and now maintains two places of business in the State of California, to wit, one at the City of Emeryville, County of Alameda, State of California, and another at the City of Los Angeles, County of Los Angeles, State of California.

5. The tax complained of in this case is claimed to be due under the Use Tax Act of 1935 of the State of California, being chapter 361 of the Statutes of 1935 of said state, which at all times pertinent to this action has been and now is in full force and effect. The copy of said Act attached to the bill of complaint herein is a true copy.

Hereinafter in these findings the use of the present tense indicates a continuous course of action during all of the times material to the issues in this case.

6. Plaintiff's telephone and telegraph system extends into several states and is connected with other telephone and telegraph systems, and, by means of its said telephone and telegraph system and said connections with other telephone and telegraph systems, plaintiff handles a great number of [fol. 121] interstate communications and does a great volume of interstate business.

7. The plaintiff's interstate and intrastate telephone and telegraph commerce and business are inextricably intermingled. Plaintiff's interstate and intrastate telephone and telegraph system includes plant and equipment sufficient to enable it to render efficient and economical telephone service according to the demand of the public for such telephone service, including both interstate and intrastate service. It is not feasible, economically or practically, for a corporation engaged, as the plaintiff is, in an inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, to provide separate state-wide telephone and telegraph systems, one for the interstate business and the other for the intrastate business of such corporation.

8. Plaintiffs interstate and intrastate telephone and telegraph system, and all of plaintiff's capital (with relatively small exceptions not material to this action), including plant and operating capital, are exclusively devoted inextricably and indiscriminately to interstate and intrastate telephone and telegraph service, commerce and business, the same

plant, facilities and organization being devoted indiscriminately to and used indiscriminately in such interstate and intrastate service. Reference hereinafter in these findings to plaintiff's "telephone and telegraph system" and to plaintiff's "telephone and telegraph business" means and is reference to plaintiff's telephone and telegraph system devoted inextricably and indiscriminately to interstate and intrastate telephone and telegraph service, and to plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

9. In the necessary operation, maintenance and repair of its telephone and telegraph system, plaintiff purchases from [fol. 122] Western Electric Company, Incorporated, hereinafter called "Western Electric," large amounts of tangible personal property consisting of equipment, apparatus, materials and supplies for use as integral parts of and exclusively in and in common for its interstate and intrastate telephone and telegraph commerce and business. Plaintiff purchases all of said tangible personal property in accordance with the purposes, plan and methods hereinafter described in findings Nos. 20, 21, 22, 23, 28, 29 and 30 hereof, and for the sole and exclusive purpose of making it a part of plaintiff's said telephone and telegraph system and of using it indiscriminately and in common in and for the conduct of plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, and of doing and performing all of the acts and things with respect to such property, including holding and retention thereof in the State of California, which are hereinafter described. Said purchases are made at points outside the State of California, and said equipment, apparatus, materials and supplies are shipped in interstate commerce by Western Electric to plaintiff at various points in the state.

10. Plaintiff intends to, and will in the future, continue to purchase from Western Electric, at points outside the State of California, like and other equipment, apparatus, materials and supplies for its purposes in conducting its said interstate and intrastate telephone and telegraph business.

11. The tangible personal property involved in this action is of two general classes: goods purchased on specific orders for installation at a particular place and to serve a particular purpose in the plaintiff's telephone and telegraph system

hereinafter called "specific order equipment"; and goods purchased from time to time for holding as stand-by facil- [fol. 123] ities to meet fluctuating demands and emergencies resulting from changes in the public demand for service and to make repairs necessitated by the casual destruction of plaintiff's property, etc., hereinafter called "stand-by facilities."

12. During the quarterly periods of three months which ended respectively June 30, 1936, September 30, 1936, December 31, 1936, March 31, 1937, June 30, 1937, September 30, 1937, December 31, 1937 and March 31, 1938, plaintiff purchased from Western Electric at points outside the State of California tangible personal property of the character hereinabove described for the total sales or purchase price of $6,977,623.66. The respective amounts of the purchase price of the specific order equipment, the stand-by facilities, and the total tangible personal property so purchased by plaintiff from Western Electric during said eight quarterly periods, and the respective amounts of the total tax claimed by defendants to be due on account thereof under the terms of the Use Tax Act of 1935 of the State of California, are as follows:

| Quarter ending | Price of specific order equipment | Price of stand-by facilities | Total price of tangible personal property | Tax claimed to be due |
|---|---|---|---|---|
| June 30, 1936 | $435,082.00 | $116,387.00 | $551,469.00 | $16,544.07 |
| Sept. 30, 1936 | 1,631,653.00 | 11,488.00 | 1,643,141.00 | 49,294.23 |
| Dec. 31, 1936 | 569,801.00 | 56,433.00 | 626,234.00 | 18,787.02 |
| Mar. 31, 1937 | 471,135.21 | 103,000.33 | 574,135.54 | 17,224.07 |
| June 30, 1937 | 825,326.56 | 40,235.76 | 865,563.32 | 25,996.90 |
| Sept. 30, 1937 | 745,530.00 | 28,597.00 | 774,127.00 | 23,223.81 |
| Dec. 31, 1937 | 610,104.00 | 26,800.00 | 636,904.00 | 19,107.11 |
| Mar. 31, 1938 | 1,272,182.24 | 33,867.56 | 1,306,049.80 | 39,181.49 |

13. The estimated amount of the sales or purchase price of tangible personal property which plaintiff, during each succeeding quarterly period as defined in said Use Tax Act [fol. 124] of 1935, will purchase in interstate commerce at points outside the State of California, and which will be shipped to plaintiff to points within the State of California for use in the operation and conduct of plaintiff's said interstate and intrastate telephone and telegraph business, will amount to approximately $360,000; and the estimated amount of the taxes which the defendants intend to and will claim to be due from plaintiff on account of the said sales or purchase price of said property under said Use Tax Act of 1935 and the rulings and regulations made by said defend-

Items

[Note instruction 8]

Aisle—lighting equipment.
Balconies for distributing frames.
Banks—connector, selector.
Batteries.

[Here follows continuation of alphabetical list of items of equipment.]"

The operating expense accounts include, among others, a number of repair accounts. Typical of the specifications for these repair accounts are the specifications for the account of repairs of pole lines, which are as follows:

"602.1. Repairs of pole lines.—This account shall include the cost of repairing pole lines and the cost of maintaining right of way therefor.

[Here follows list of items.]"

The uniform system of accounts also prescribes an account of material and supplies, described as follows:

"122. Material and supplies.—(A) This account shall include the cost of unapplied material and supplies held in stock, including plant supplies, tools, fuel, stationery, directory paper stock, and other supplies; and material and articles of the company in process of manufacture for supply stock."

[fol. 127] 18. Immediately upon the purchase of the articles of tangible personal property hereinabove mentioned they became and are subject to accounting in the manner and form hereinabove described.

19. Specific order equipment consists of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, central office cable, wire, protectors and other component parts of telephone and telegraph lines.

20. The plaintiff orders all of the specific order equipment for immediate installation in the manner hereinafter described in findings Nos. 24 and 25 hereof at particular points in plaintiff's telephone and telegraph system and to serve particular purposes and needs in the system. Plaintiff pur-

chases equipment of this class for four general purposes: (1) to meet the public demand for telephone and telegraph service in territories in which plaintiff is operating and offering such service, in accordance with plaintiff's obligations as a corporation engaged in and rendering telephone and telegraph service, (2) to improve existing service, as part of a service improvement program, (3) to render existing service at less cost, as part of a general economy program, and (4) to make plant changes necessary to maintain the efficiency of plaintiff's system, and to conform to changes in public ways, rights of way, and public requirements. The plaintiff periodically makes an estimate of its equipment needs for the purposes above mentioned. This estimate is based upon (1) a survey by plaintiff's commercial department of the expected growth of telephone business in each locality and in connection with each exchange, (2) an estimate by plaintiff's traffic engineers of the equipment necessary to take care of the growth of business [fol. 128] and to fulfill plaintiff's service improvement and economy programs, and (3) an estimate by plaintiff's equipment engineers of the actual equipment specifications to fill the equipment needs found by the traffic engineers. As a matter of practical economy, such an estimate provides for the least practical quantities of equipment required for the particular purpose to be served.

21. To meet a need thus disclosed at a particular point and for a particular purpose in plaintiff's telephone and telegraph system, plaintiff's engineers draw up a "project" containing the equipment specifications and costs necessary to fulfill this need in the most efficient and most economical manner, and in the manner best calculated to serve the public. Plaintiff's equipment engineers reduce the project to its detailed specifications—the number of frames, the number and type of switches, size and arrangement of trunk groups, etc.—with supplemental explanatory drawings. The project, if it involves a large expenditure, is then submitted to plaintiff's executive officers and board of directors for approval and authority to make the expenditure; if the expenditure is small, the project is submitted to some other designated official of plaintiff.

22. When a project is thus approved and the necessary expenditure authorized, plaintiff's engineers prepare an order or "requisition," and forward it to Western Electric.

In the case of central office equipment and private branch exchange switchboards, the requisition is accompanied by the detailed specifications and drawings.

23. Western Electric manufactures specially—i. e., makes to order and according to plaintiff's particular specifications, as to each article of equipment—central office switchboards, large private branch exchange switchboards, large [fol. 129] underground cables, switches, frames, cable racks, etc., thus ordered by plaintiff. It may manufacture specially, or may take out of existing stock, items such as central office cable, wire, and protectors. By far the larger part of the specific order equipment is not manufactured by Western Electric until it receives orders therefor, and is then manufactured according to plaintiff's particular specifications as to each article of equipment; and its stock of other equipment is manufactured after receipt from plaintiff of a "preview" of anticipated orders, which, when they are given, can be filled out of such stock. All of the specific order equipment is especially designed for use in the operation of a telephone and telegraph system, and is peculiarly adapted to telephone and telegraph uses and is not suitable for any other use.

24. A single exception to some of the statements of fact hereinabove contained exists in the following particular: the category of specific order equipment includes a small number of exchange telephone poles (which are of a different specification, size and weight, being larger and heavier, than are toll poles and other exchange poles which are purchased by plaintiff for, and are peculiarly adapted to, plaintiff's own exclusive use as aforesaid) with the plan and for the purpose of using them, under joint pole agreements, jointly with power companies, light companies, etc., for carrying plaintiff's telephone and telegraph wires and also the wires of such other companies. The purchase and use of joint poles in this manner is an ordinary and customary practice in the conduct of a telephone and telegraph business such as that of the plaintiff. Plaintiff receives payment from such other company or companies for the right and interest of such other company or companies in and to their joint use of such joint poles. Plaintiff's use of such joint poles is exclusively for and in the conduct of its interstate [fol. 130] and intrastate telephone and telegraph commerce and business as aforesaid, and is by means of crossarms

and other equipment peculiarly adapted to telephone and telegraph uses as aforesaid and not suitable for any other use.

25. Specific order equipment, after the termination of the interstate shipment thereof, is installed either by plaintiff's employees or by experts in the employ of an agency hired by plaintiff to make specific installations. In either case, plaintiff orders and Western Electric arranges delivery at times which not only are appropriate to the desired time for completion of each installation project but also coincide with times when the installers will be available to make the installation. Western Electric ships the goods, when ready, by public carrier, consigned to plaintiff at the place of use. When plaintiff is informed that the goods have arrived, plaintiff sends its trucks to be at the dock or railroad car at the time when, as plaintiff is informed, the goods will be ready for delivery and available for unloading. Plaintiff's representative receipts for the goods at the dock or breaks the seal of the railroad car, as the case may be, and plaintiff's employees unload the goods directly from the dock or car into the trucks. Generally the trucks are driven directly to the building in which the equipment is to be installed; but in handling some kinds of equipment in large metropolitan centers, for reasons of economy in trucking, the equipment is sometimes carried first to a distributing center and there reloaded into other trucks which carry it to the building in which it is to be installed. The equipment is then moved directly from the truck into the building to the place of installation. On the arrival of the equipment at the place of installation, the installers commence installation immediately and the installation is a continuous proc-[fol. 131] ess, except as this statement is qualified by the matters stated in finding No. 26.

26. There is no holding, in any warehouse, storeroom or other like place of deposit, of any of the specific order equipment after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such equipment is retained or held in the possession of the plaintiff, and is not in motion in the course of installation thereof, occur between the time of termination of the interstate shipment thereof and the time when the installation of such equipment is completed and said equipment is available, as physically connected parts of

plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from the dock or car and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. In practically all installation projects the process of connecting parts of the equipment with and into plaintiff's physical plant is under way before the gathering of all equipment involved in the project at the place of connecting the same with said plant is complete. There is no retention or holding of any of said equipment except such as necessarily occurs in the ordinary and efficient course of transporting said equipment to its ultimate destination and installing it as physically connected parts of plaintiff's telephone and telegraph plant.

With reference to private branch exchange switchboards only, in exceptional instances it occurs that a subscriber [fol. 132] orders such a switchboard for installation at a particular time, and that, because of construction delays and for like reasons, the place where such switchboard is to be installed is not ready when plaintiff receives such switchboard at the end of the interstate shipment thereof. Plaintiff then holds such switchboard at some convenient place until the place of installation is ready, and then installs the same as hereinabove described. The period of such holding, in the experience of plaintiff, rarely exceeds a few days.

27. When plaintiff receives specific order equipment from Western Electric, as hereinabove described, plaintiff's accounting department, pursuant to the said accounting rules and regulations and uniform system of accounts for telephone companies, charges to its repair accounts (being accounts of plaintiff's expenses of operating its said interstate and intrastate telephone and telegraph system, as hereinabove described) the cost of such part of the equipment as is installed in plaintiff's plant for the purpose of making repairs, and to its appropriate plant accounts (being accounts of plaintiff's capital devoted to the telephone and telegraph service, as hereinabove described) the cost of

such part of the equipment as constitutes new additions in plaintiff's telephone and telegraph system.

28. In the interest of prompt and efficient public service and in the performance and discharge of its obligations to the public as a corporation engaged in and rendering telephone and telegraph service, plaintiff is required and compelled to have supplies to meet current requirements distributed over its entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the public de- [fol. 133] mand for service and the repairs which from time to time are unavoidably made necessary by the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties and ordinary wear and tear which occur in connection with conducting its telephone and telegraph commerce and business.

29. Stand-by facilities purchased by plaintiff from Western Electric at points outside the state consist of small private branch exchange switchboards, teletypewriter equipment, cable, loading coils, poles, crossarms, wood conduits and a small amount of copper wire. Private branch exchange switchboards and teletypewriter printers comprise by far the largest part of the stand-by facilities. All of such stand-by facilities are especially designed for use in the operation of a telephone and telegraph system, and are peculiarly adapted to telephone and telegraph uses and are not suitable for any other use.

30. To replenish supplies of stand-by facilities, plaintiff's supply department places orders with Western Electric approximately once a month. As a matter of practical business economy, plaintiff thus orders periodically only such quantities of stand-by facilities as it determines to be necessary in the conduct and operation of its said telephone and telegraph business and system to meet current requirements, emergency demands, repairs, and wear and tear, as above stated.

31. Western Electric ships such stand-by facilities by carrier, consigned to plaintiff at central points of its tele-

phone and telegraph system. When notified of the arrival of the goods plaintiff sends trucks to pick them up at the dock or railroad depot. Plaintiff's employees unload the goods directly into the trucks and carry them, in accordance with the needs and purposes for which they were ordered, [fol. 134] to the places where plaintiff keeps stores of such stand-by facilities, or in some instances, for reasons of economy in trucking, to a distributing center, there to be reloaded into other trucks which carry them to the places where plaintiff keeps stores of stand-by facilities. After the termination of the interstate shipment of such stand-by facilities, and upon their arrival at the said places where plaintiff keeps its stores of stand-by facilities, plaintiff retains and holds them in said stores as stated in finding No. 32.

32. Plaintiff retains and holds and keeps on hand, in storage space provided by it in the State of California at strategic points—i.e., at points suitable for prompt distribution of stand-by facilities as needed—over its entire telephone and telegraph system, private branch exchange switchboards and teletypewriter equipment, and small stores of poles, cable and loading coils. Plaintiff keeps its stores of such materials in quantities necessary to meet current requirements and the constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time are unavoidably made necessary by the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties and ordinary wear and tear which occur in connection with conducting plaintiff's telephone and telegraph business.

33. The distribution by plaintiff of stand-by facilities to stores located at strategic points over plaintiff's telephone and telegraph system, and the holding of such stand-by facilities in these stores, as hereinabove described, is necessary to insure the rendition by plaintiff, as efficiently and as free from interruption as possible, of interstate and intrastate telephone and telegraph service.

34. When repairs become necessary to any part of plain- [fol. 135] tiff's telephone and telegraph system, plaintiff's employees who are charged with making such repairs take out of plaintiff's stores such of said stand-by facilities as

are necessary to make the repairs. When any person makes a demand for a private branch exchange switchboard or for teletypewriter equipment, supplies of this nature are taken out of plaintiff's stores on disbursement tickets to meet service orders. Plaintiff's installer-repairmen take these supplies out of the stores, take them to the place where they are needed and make the necessary installation.

35. Between the time when said stand-by facilities are taken from plaintiff's stores as above described and the time when the installation of such facilities is completed and said facilities are available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public, time intervals occur during which such facilities are retained or held in the possession of the plaintiff and are not in motion in the course of installation thereof; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from plaintiff's stores and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. After such stand-by facilities are taken from plaintiff's stores as above described, there is no retention or holding of any of said facilities except such as necessarily occurs in the ordinary and efficient course of transporting said facilities to their ultimate destination and installing them as physically connected parts of plaintiff's telephone and telegraph plant.

[fol. 136] 36. When plaintiff receives such stand-by facilities from Western Electric, as hereinabove described, plaintiff's accounting department, pursuant to the said accounting rules and regulations and uniform system of accounts for telephone companies, charges the cost thereof to its "Materials and Supplies" account. Upon taking such supplies from its stores, plaintiff credits them to its said "Materials and Supplies" account, and charges them to its repair accounts if they are installed in plaintiff's plant for the purpose of making repairs, or to the appropriate plant accounts if they constitute new additions in plaintiff's plant.

37. The installation of all of said equipment, facilities, apparatus and materials is for the sole purpose of making said articles available as physically connected parts of plaintiff's telephone and telegraph plant for carrying interstate and intrastate communications for the public, and is necessary to that end.

38. In accordance with said accounting rules and regulations and uniform system of accounts, plaintiff charges the cost of carrying said articles by truck from the dock or railroad to the place of installation (including the cost of use of the trucks and the wages of the truckmen) and the cost of installation (including the wages of plaintiff's employees engaged in installation and the amounts paid to installers hired from time to time) to its appropriate repair accounts or plant accounts as a part of the cost of said repairs or additions to plant.

39. When said articles of tangible personal property are physically connected with the plaintiff's telephone and telegraph plant they become and are a part of the facilities by which plaintiff's subscribers, and others who avail themselves of the telephone and telegraph service offered by the plaintiff, command at their pleasure the service they desire, [fol. 137] whether interstate or intrastate; and all of said articles of tangible personal property, including specific order equipment and stand-by facilities, when the same are available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public, are used by plaintiff exclusively in and for the operation and maintenance of plaintiff's telephone and telegraph system and indiscriminately and in common in and for conducting its inextricably intermingled interstate and intrastate telephone and telegraph commerce business.

40. If the tax, the collection of which is sought by this action to be enjoined, should be paid, said tax would be paid out of plaintiff's capital devoted to the telephone and telegraph service as hereinabove stated, and would be a charge to plaintiff's operating expense accounts or plant accounts as part of the cost of the tangible personal property, on account of which such tax should be paid, and which cost is charged to plaintiff's operating expense accounts and plant accounts as hereinabove described. If said tax should be

required to be paid, it would be a charge to and become a cost of conducting plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

41. By reason of its inextricably intermingled interstate and intrastate commerce and business plaintiff is compelled to purchase from Western Electric, at points outside the State of California, a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate telephone and telegraph business. This is true because (1) a substantial quantity of plaintiff's equipment, such as pole lines between the state lines and cities near the border of California, and direct wires running from central offices and toll offices in large municipalities in California to large municipalities in other states, [fol. 138] together with the portions of switchboard and other equipment connected therewith, are used for carrying interstate communications only and handle no intrastate business, (2) the amount of a large part of the central office equipment and other equipment which plaintiff necessarily maintains and operates in the conduct and operation of its telephone and telegraph business as aforesaid, is determined by the amount of traffic, including both interstate and intrastate telephone and telegraph communications, which it bears, and (3) plaintiff is informed and believes that some undetermined part of its equipment is necessarily maintained and operated in order to serve subscribers and patrons who would not demand or request telephone and/or telegraph service unless interstate as well as intrastate service were held out by plaintiff to such subscribers and patrons.

42. Notwithstanding that none of the property aforesaid was, is or will be used exclusively and separately by the plaintiff in conducting intrastate telephone and telegraph business, but that all of it is used as hereinbefore stated, defendants have demanded of the plaintiff the taxes aforesaid, under the provisions of Ruling No. 11 of the defendant, said State Board of Equalization, promulgated on or about February 6, 1936, which said ruling is as follows:

"The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property

in this State after the shipment of the property in interstate or foreign commerce has ended.

The fact that tangible personal property is used in this State in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from tax. The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State."

43. Under said act, said defendants, and each of them, [fol. 139] claim that there is due from, and payable by, plaintiff, taxes on all plaintiff's purchases of tangible personal property described in findings Nos. 9, 10, 11 and 12 hereof, and demand payment thereof, and if the plaintiff should fail or refuse to pay such taxes so demanded, said defendants, and each of them, intend and directly and expressly threaten to, and, unless restrained by the judgment or order of this court, will, in pursuance of their said expressed intention, institute and cause to be instituted summary suits or other proceedings to compel the said payment of said tax, interest and penalties provided by said act.

Defendants, and each of them, further threaten, in accordance with the procedure laid down in said act, to cause summary process to be issued for the seizure and sale of personal property of plaintiff used by plaintiff as instrumentalities of interstate commerce in the necessary operation, maintenance and repair of its said telephone and telegraph system, and thereby plaintiff's said business will be interfered with and plaintiff will be prevented from conducting its said telephone and telegraph business to its great and irreparable damage in the sum of more than $50,000, for which damages defendants are not financially able to respond and for which plaintiff has no adequate remedy at law. Defendants, and each of them, threaten to and will bring repeated suits against plaintiff for further quarterly installments of said tax and subject plaintiff to a multiplicity of suits and harassing litigation to plaintiff's great and irreparable damage.

44. The payment of said taxes would require plaintiff to pay to said Western Electric, on or before August 14, 1936, being the time fixed by said Use Tax Act of 1935, as extended by said Board, the several large amounts of tax for the quarterly period ending June 30, 1936, hereinbefore stated, and on or before the 15th day of the month follow-

[fol. 140] ing each subsequent quarterly period of three months the amounts of tax payment for such subsequent quarterly period, and to suffer the loss of use of such money and the earning value thereof until recovered by suit, if recoverable at all, and in order to comply with the requirements of the said act and the demands of said defendants and each thereof, it is necessary for the plaintiff to incur substantial expenses in tax accounting and in keeping records of information concerning purchases and the uses of such properties necessary to defend its rights against the imposition of such taxes and it will be necessary to continue such accounting unless relieved from the necessity so to do and to pay such taxes by the injunction sought in this proceeding, and such expenses, if so incurred, will constitute a substantial and irreparable loss to the plaintiff.

45. The only remedial procedure prescribed by said act for the recovery of taxes paid or which may be paid by the plaintiff under said act is to make payment of such taxes under protest and bring an action for the recovery thereof within a short period of limitation, to wit (as said act provided at the commencement of this action and thereafter until July 1, 1937), sixty days following the payment thereof, and to wit (as said act, having been amended July 1, 1937, by chapter 683 of the Statutes of 1937 of the State of California, provided from and after July 1, 1937, and now provides), one year following the payment thereof, against the State Treasurer of the State of California, in a court of competent jurisdiction in the County of Sacramento, for the recovery of the amount of taxes paid under protest; and the phrase "a court of competent jurisdiction in the County of Sacramento" is intended to mean and means a state court of competent jurisdiction, being the Superior Court of said county; and such provision of the act is not intended to provide for an action in the federal court.

[fol. 141] Conclusions of Law

(1) The court has jurisdiction of all of the parties hereto and of the subject-matter of this action.

(2) This suit arises under the Constitution of the United States.

(3) The imposition of the California Use Tax upon the acts and transactions found in the foregoing findings of

ants in connection therewith, will, unless the collection of said tax is restrained by injunction, amount to the sum of approximately $12,000.

14. All of the articles of tangible personal property hereinabove described are purchased by plaintiff through use of operating capital, consisting of money or current assets definitely devoted to the telephone and telegraph service, or through the credit of plaintiff as a telephone and telegraph company engaged in such telephone and telegraph service.

15. All of said articles of tangible personal property hereinabove described are necessary to the efficient and economic operation of plaintiff's telephone and telegraph system, and the purchases thereof are made in the manner hereinafter described and at the times and in the amounts necessary to meet the needs of plaintiff's telephone and telegraph business. Plaintiff considers said articles from the time of their purchase as a part of plaintiff's said telephone and telegraph system and as instrumentalities devoted to the operation and conduct of plaintiff's telephone and telegraph business.

16. Plaintiff engages in no business other than its said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business. The said [fol. 125] articles, by reason of their nature, and by reason of the purpose for which and the particular specifications by which they are manufactured, as hereinafter described, are not, after their purchase by plaintiff from Western Electric, as hereinabove described, readily or practically salable by plaintiff to other persons, and plaintiff does not divert and has no practical way of diverting any of said articles to any use other than their intended use in plaintiff's said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

17. Plaintiff keeps the accounts of its said telephone and telegraph business according to the accounting rules and regulations and the uniform system of accounts for telephone companies promulgated and prescribed by the Federal Communications Commission. The uniform system of accounts contains telephone plant accounts, described as follows:

"Telephone Plant Accounts

20. Purpose of telephone plant accounts.—(A) The telephone plant accounts (201 to 277, inclusive) are designed to show the original cost (note instruction 3–S.1) of the company's telephone plant (note instruction 3–BB) which ordinarily has a service life of more than 1 year, including such plant whether used by the company or others in telephone service (note instruction 3–AA); also the original cost of franchises, patents, rights of way, leaseholds and other interests in land. It shall also include the general expenses of organization of the accounting company."

and operating expense accounts, described as follows:

"Operating Expense Accounts

60. Purpose of operating expense accounts.—The operating expense accounts (602.1 to 677 inclusive) are designed to show the expenses of furnishing telephone service (note instruction 3–AA), including expense of maintaining the plant used in such service. (Note also instructions 4, 5, and 6.)"

Telephone plant accounts include, among others, accounts of central office equipment, station apparatus, station in- [fol. 126] stallation, pole lines, aerial cable, buried cable, aerial wire, underground conduit, and furniture and other office equipment. Typical of the specifications for these accounts are the specifications for the central office equipment account, which are as follows:

"221. Central office equipment.—(A) This account shall include the original cost (note instruction 3–S.1) of electrical instruments, apparatus, and equipment, other than station equipment, in central offices (including terminal and test rooms), repeater stations and test stations used in transmitting traffic and operating signals, and similar equipment in operators' schools and other centralized locations.

(B) This account shall also include the original cost of operators' chairs, wire chiefs' tools, desks and tables equipped with central office telephone equipment, and other furniture, fixtures, and equipment designed specifically for use in central offices, repeater stations, etc., or installed as a part of the electrical equipment therein. (See also note A to this account.)

fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, would not be a direct burden upon the interstate commerce and business of the plaintiff and would not be contrary to or in violation of the provisions of Clause 3 of Section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

(4) By reason of the facts and circumstances hereinbefore found and concluded plaintiff's application for a permanent injunction should be denied and the bill of complaint on file herein should be dismissed.

Let the Decree be entered accordingly.

William Denman (United States Circuit Judge).
Michael J. Roche (United States District Judge).
—— —— (United States Circuit Judge).

Due service and receipt of a copy of the foregoing proposed findings of fact and conclusions of law is hereby acknowledged this 18th day of May, 1938.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

Approved as to form as provided by Rule 22.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 142] In United States District Court

[Title omitted]

Objections to Conclusions of Law Proposed by Defendants, and Conclusions of Law Proposed by Plaintiff—Filed May 25, 1938

[fol. 143] The plaintiff above named objects to the conclusions of law proposed by the defendants herein and lodged with the clerk of this court, as follows:

1. To such conclusions as a whole, on the grounds that they are insufficient, incomplete and incorrect and deny to plaintiff the relief to which it is lawfully and equitably entitled; that they are not supported or justified by the find-

ings of fact and the admitted allegations of the bill of complaint herein; and that said findings of fact and admitted allegations of the bill of complaint necessitate the decision and conclusion, contrary to the decision and conclusion expressed in said proposed conclusions of law, that plaintiff is entitled to the relief prayed for in its said bill of complaint.

2. To proposed Conclusion of Law No. 3, upon the grounds that it is not supported or justified by the findings of fact and the admitted allegations of the bill of complaint, and that said findings of fact and admitted allegations of said bill of complaint support no conclusion in respect of the matters embraced in said proposed Conclusion No. 3, other than a conclusion contrary to said proposed Conclusion No. 3.

3. To proposed Conclusion of Law No. 4, upon the grounds that it is not supported or justified by the findings of fact and the admitted allegations of the bill of complaint, and that said findings of fact and admitted allegations of said bill of complaint support no conclusion, in respect of the matters embraced in said proposed Conclusion No. 4, other than a conclusion contrary to said proposed Conclusion No. 4.

In the event that the court should adopt said proposed conclusions of law or any of them as its conclusion or conclusions, plaintiff asks for an exception to the adoption of [fol. 144] each or all of said conclusions of law.

And plaintiff proposes to the court the following conclusions of law which plaintiff respectfully represents to be sufficient and correct and to be the only conclusions of law which are supported and justified by said findings of fact and admitted allegations of the bill of complaint, and plaintiff offers and moves the adoption of said conclusions of law each and separately, and in the event that the court refuses to adopt the same, asks for an exception to the denial thereof and to the denial of each one thereof:

Conclusions of Law

1. The court has jurisdiction of all of the parties hereto and of the subject matter of this action.

2. This suit arises under the Constitution of the United States.

3. The plaintiff has no plain, speedy or adequate remedy at law for the matters complained of in its bill of complaint and according to the facts heretofore found by this court.

4. If the enforcement of said California Use Tax Act of 1935 should not be restrained as prayed for in said bill of complaint, the plaintiff would suffer great and irreparable damage and injury.

5. All of the tangible personal property described in the foregoing findings of fact, from the time of its purchase as described in said findings of fact, was devoted to the service of inextricably intermingled interstate and intrastate communication and to use in carrying on the inextricably intermingled interstate and intrastate telephone and telegraph commerce and business of the plaintiff.

[fol. 145] 6. Each of the acts and transactions found in the foregoing findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, is a use in and is necessary and incidental to and a part of the inextricably intermingled interstate and intrastate commerce and business of the plaintiff.

7. The California Use Tax Act of 1935, if applied to any act or transaction found in the foregoing findings of fact to have occurred with respect to the specific order equipment described in said findings of fact, after the termination of the interstate transportation thereof, would impose a tax upon the use of said property in interstate commerce.

8. The California Use Tax Act of 1935, if applied to any act or transaction found in the foregoing findings of fact to have occurred with respect to the stand-by facilities described in said findings of fact, after the termination of the interstate transportation thereof, would impose a tax upon the use of said property in interstate commerce.

9. The imposition of a use tax upon the acts and transactions found in the foregoing findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, would be a direct burden upon the interstate commerce and business of the plaintiff.

10. The California Use Tax Act of 1935, if applied to any act or transaction found in the foregoing findings of fact

to have occurred with respect to the specific order equipment described in said findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon the operation of an instrumentality of interstate commerce.

11. The California Use Tax Act of 1935, if applied to any [fol. 146] act or transaction found in the foregoing findings of fact to have occurred with respect to the stand-by equipment described in said findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon the operation of an instrumentality of interstate commerce.

12. The threatened application of the California Use Tax Act of 1935, as found in the foregoing findings of fact, by the defendants, to the acts and transactions, or any of them, found in said findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of clause 3 of section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

13. The California Use Tax Act of 1935, if construed and applied by the defendants so as to impose a tax on the acts, or transactions, or any of them, found in the foregoing findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of clause 3 of section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

14. By reason of the facts and circumstances hereinbefore found and concluded, plaintiff is entitled to a permanent injunction as prayed for in its bill of complaint herein.

—— ——, U. S. Circuit Judge. —— ——, U. S. District Judge. —— ——, U. S. District Judge.

[fol. 147] Dated May 25, 1938.

Respectfully submitted, Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

Due service and receipt of a copy of the foregoing objections to conclusions of law proposed by defendants, and conclusions of law proposed by plaintiff is hereby acknowledged this 25 day of May, 1938.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

Approved as to form as provided by Rule 22:

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

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[fol. 148] In United States District Court, Northern District of California, Southern Division

Equity. No. 4067R

The Pacific Telephone and Telegraph Company, a Corporation, Plaintiff,

vs.

John C. Corbett et al., Defendants

Final Decree—Filed June 14, 1938

This Cause Came on to be heard on the 28th day of December, 1937, and was argued by Pillsbury, Madison and Sutro by Francis N. Marshall, Esq., Attorneys for the plaintiff, and Honorable U. S. Webb, Attorney General of the State of California by H. H. Linney and James J. Arditto, Deputies Attorney General, and thereupon on consideration thereof, it is Ordered, Adjudged and Decreed as follows, to-wit:

That plaintiff's application for a permanent injunction be denied, and the plaintiff's bill of complaint be dismissed. [fol. 149] It is Further Ordered, Adjudged and Decreed that the defendants recover their costs herein expended.

Dated this 14th day of June, 1938.

William Denman, United States Circuit Judge. Michael J. Roche, United States District Judge. ——, United States District Judge.

Approved as to form, June 3, 1938.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

Receipt of a copy of the within is admitted this 3rd day of June, 1938.

By Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 150] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed June 20, 1938

[fol. 151] Petition for Appeal

Considering itself aggrieved by the final judgment and decree of the District Court of the United States for the Northern District of California, Southern Division, specially constituted under section 266 of the Judicial Code, in the above entitled cause, the plaintiff therein, The Pacific Telephone and Telegraph Company, hereby prays that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said plaintiff assigns the following errors in the record and proceedings in the said cause:

The District Court of the United States for the Northern District of California, Southern Division, erred in the following particulars:

1. The court erred in concluding as a matter of law that the imposition of the California use tax upon the acts and transactions found to have occurred with respect to the tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, would not be a direct burden upon the interstate commerce and business of the plaintiff.

2. The court erred in concluding as a matter of law that the imposition of the California use tax upon the acts and transactions found to have occurred with respect to the

tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, would not be contrary to or in violation of the provisions of clause 3 of section 8 of Article I of the Constitu-[fol. 152] tion of the United States and the rights, privileges and immunities of the plaintiff thereunder.

3. The court erred in concluding as a matter of law that plaintiff's application for a permanent injunction should be denied and the bill of complaint dismissed.

4. The court erred in failing and refusing to conclude as a matter of law, as requested by the plaintiff, that the imposition of a use tax upon the acts and transactions found to have occurred with respect to the tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, would be a direct burden upon the interstate commerce and business of the plaintiff.

5. The court erred in failing and refusing to conclude as a matter of law, as requested by the plaintiff, that the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297), if applied to any act or transaction found to have occurred with respect to the specific order equipment described in the findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon the operation of an instrumentality of interstate commerce.

6. The court erred in failing and refusing to conclude as a matter of law, as requested by the plaintiff, that the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297), if applied to any act or transaction found to have occurred with respect to the stand-by facilities described in the findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon the operation of an instrumentality of interstate commerce.

7. The court erred in failing and refusing to conclude as [fols. 153-202] a matter of law, as requested by the plaintiff, that the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297), if construed and applied by the defendant so as to impose a tax upon the acts or transactions, or any of them, found to have occurred with respect to the tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of clause 3

of section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

8. The court erred in failing and refusing to conclude as a matter of law, as requested by the plaintiff, that plaintiff is entitled to a permanent injunction as prayed for in its bill of complaint.

9. The court erred in decreeing that plaintiff's application for a permanent injunction be denied.

10. The court erred in decreeing that plaintiff's bill of complaint be dismissed.

Prayer for Reversal

For which errors the plaintiff, The Pacific Telephone and Telegraph Company, prays that the said decree of the District Court for the Northern District of California, Southern Division, dated June 14, 1938, in the above entitled cause, be reversed, and that said court be ordered to enter a decree in favor of said plaintiff, and that the plaintiff be awarded its costs.

Alfred Sutro, Francis N. Marshall, Counsel for Appellant.

[File endorsement omitted.]

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[fol. 203] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed June 20, 1938

[fol. 204] The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled suit by the District Court of the United States for the Northern District of California, Southern Division, on the 14th day of June, 1938, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here Ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the District Court of the United States for the Northern District of California, Southern Division, in the above entitled cause, as provided by law, and it is further ordered that the clerk of said District Court shall prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within sixty (60) days of this date.

And it is further Ordered that security for costs on appeal be fixed in the sum of $500.00.

Dated June 20, 1938.

William Denman, United States Circuit Judge.

[File endorsement omitted.]

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[fols. 205-210] Bond on Appeal for $500.00, approved and filed June 22, 1938, omitted in printing.

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[fol. 211] In United States District Court

[Title omitted]

Stipulation as to Contents of Transcript of Record—Filed June 21, 1938

[fol. 212] It is hereby stipulated that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

1. Bill of complaint for injunction, including exhibit attached thereto;
2. Motion for temporary restraining order and application for hearing for interlocutory injunction;
3. Order noticing necessity for other judges, issuing temporary restraining order and order to show cause for temporary injunction;
4. Proof of service of bill of complaint, order to show cause, etc., on the Governor of the State of California;

5. Motion to dismiss bill of complaint;
6. Opinion, filed September 10, 1937;
7. Opinion referred to therein, being opinion filed same date in Southern Pacific Company v. John C. Corbett, et al., Equity No. 4055-S;
8. Decree for interlocutory injunction;
9. Answer to bill of complaint to enjoin collection of taxes under California Use Tax Act of 1935;
10. Stipulation of facts;
11. Opinion, filed May 4, 1938;
12. Opinion referred to therein, being opinion filed May 3, 1938, in Southern Pacific Company v. John C. Corbett, et al., Equity No. 4055-S;
13. Findings of fact and conclusions of law proposed by defendants, and adopted by the court;
14. Objections to conclusions of law proposed by defendants, and conclusions of law proposed by plaintiff;
15. Final decree;
[fol. 213] 16. Petition for appeal, assignment of errors, and prayer for reversal;
17. Statement as to jurisdiction;
18. Order allowing appeal;
19. Bond for costs;
20. Original citation, with acknowledgment of service;
21. Notice under Rule 12, paragraph 2, and acknowledgment of service of appeal papers;
22. Stipulation as to contents of transcript of record.

Inasmuch as the case was submitted on the complaint, answer and stipulation of facts, which are to be included in the transcript of record as herein stipulated, there is no narrative statement of evidence pursuant to Equity Rule 75.

It is agreed that the bonds for temporary restraining order, the bonds for interlocutory injunction, the order of the court restoring and continuing interlocutory injunction pending appeal, and the bond therefor, all heretofore filed herein, are not necessary to the consideration of the appeal and need not be included in the transcript of record.

Alfred Sutro, Francis N. Marshall, Counsel for Appellant. U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Counsel for Appellees.

[File endorsement omitted.]

[fol. 214] Clerk's certificate to foregoing transcript omitted in printing.

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[fols. 215-216] Citation, in usual form, showing service on U. S. Webb et al., filed June 21, 1938, omitted in printing.

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[fol. 217] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 19, 1938

The appellant adopts its assignment of errors as its statement of the points to be relied upon in this court.

The appellant designates the whole of the record, as filed, to be printed, except Exhibit "A" to the bill of complaint (page 35 of the original certified transcript), the same being a copy of the California Use Tax Act of 1935, which is now officially published in Cal. Stats., 1935, p. 1297, ch. 361.

Alfred Sutro, Francis N. Marshall, Counsel for Appellant.

[fol. 218] Due service and receipt of a copy of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed is hereby acknowledged this 13th day of July, 1938.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Counsel for Appellees.

[fol. 219] [File endorsement omitted.]

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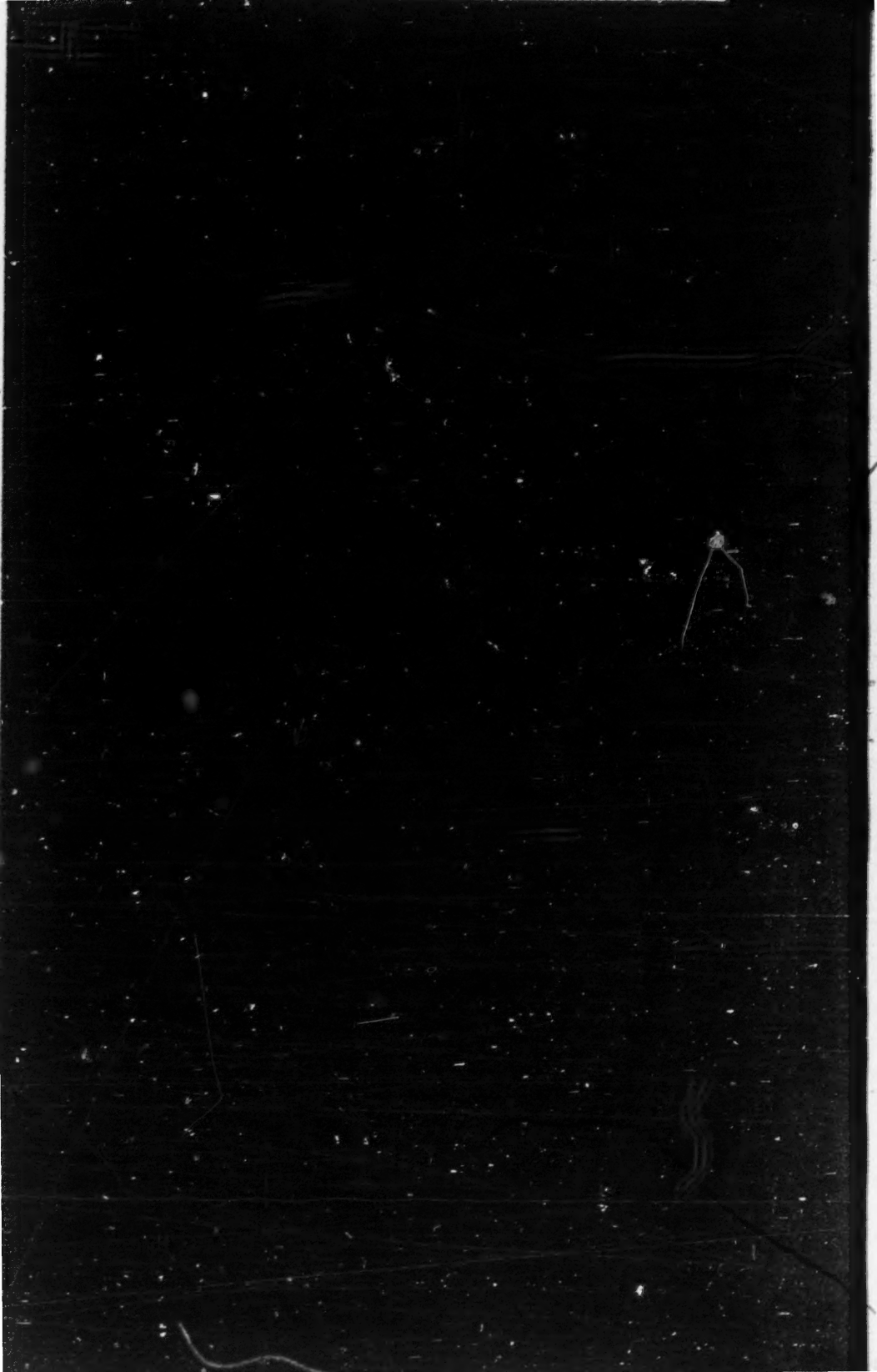
Endorsed on cover: File No. 42,698. N. California, D. C. U. S. Term No. 213. The Pacific Telephone and Telegraph Company, appellant, vs. John C. Corbett, Fred E. Stewart, Richard E. Collins, William G. Bonelli and Harry B. Riley, as Members of the State Board of Equalization of the State of California. Filed July 19, 1938. Term No. 213, O. T., 1938.



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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1938.**

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# No. 213

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THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION,

*Appellant,*

*vs.*

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, AND U. S. WEBB, THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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## STATEMENT AS TO JURISDICTION.

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This is an appeal from a final decree of a district court of the United States specially constituted pursuant to Section 266 of the Judicial Code, denying a permanent injunction and dismissing the bill of complaint.

The suit was brought by the appellant in the United States District Court for the Northern District of California, Southern Division, to enjoin State officers—the State Board of Equalization of the State of California and its individual members, and the Attorney General of the State—from enforcing the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297, ch. 361) with respect to property purchased by appellant outside the State and used by it in the State in the operation of its inextricably intermingled interstate and intrastate telephone and telegraph business. The injunction is prayed upon the ground that the statute, as sought to be applied by the appellees with respect to the property in question, is repugnant to the commerce clause of the Federal Constitution.

The appellant pressed its application for an interlocutory injunction, and the court, specially constituted of three judges, denied appellees' motion to dismiss the bill of complaint and granted the application for interlocutory injunction. The application was heard with a like application in a similar case, *Southern Pacific Company* v. *Corbett*, hereinafter referred to as the *Southern Pacific* case. The opinion on the motion to dismiss and the application for interlocutory injunction is not reported; a copy is appended hereto as Appendix A. At the same time the court rendered an opinion in the *Southern Pacific* case, which is reported at 20 F. Supp. 940.[1]

Appellees answered and the facts were stipulated. Upon final hearing, the court made findings of fact and conclusions of law, denied a permanent injunction and dismissed the

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[1] The opinions of the District Court of the United States for the Northern District of California on the motion to dismiss and on the final hearing in the case of *Southern Pacific Company* v. *Corbett* will be found printed as appendices to the Statement as to Jurisdiction in the case of *Southern Pacific Company* v. *Corbett*, No. 212, October Term, 1938.

bill. The court's opinion is not reported.[2] At the same time the court took similar action in the *Southern Pacific* case and its opinion in that case is not yet reported.[3]

**Jurisdiction of the District Court.**

This is a suit of a civil nature in equity, in which the amount of the taxes the collection of which is sought to be enjoined exceeds $3,000,[4] and the suit arises under the Constitution of the United States.

The bill of complaint alleged facts showing that appellant would be irreparably injured if the injunction should not be granted, and showing that appellant was without a plain, speedy or adequate remedy at law or in equity in the State courts, and particularly that the appellant was without any remedy at law in the Federal courts.[5] The District Court sustained its equity jurisdiction on the ground last mentioned, the only ground which it found it necessary to consider (see opinion in the *Southern Pacific* case).

It is well settled that in suits not controlled by the 1937 amendment to Section 24 of the Judicial Code, the want of

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[2] Since the presentation and filing of the jurisdictional statement, this opinion has been reported at 23 F. Supp. 197.

[3] Since the presentation and filing of the jurisdictional statement, this opinion has been reported at 23 F. Supp. 193.

[4] The amount of the taxes claimed to be due at the time the suit was commenced was $16,544.07. The complaint asks an injunction against the collection of these taxes and of the taxes for each subsequent quarterly period for which appellees claim that a tax is due under the provisions of the California Use Tax Act.

[5] The bill of complaint in this case was filed August 11, 1936. The Act of Congress of August 21, 1937 (c. 726, 50 Stat. 738), amending section 24 of the Judicial Code, which now provides that no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state, expressly provided that its provisions should not apply to suits commenced prior to its passage.

a remedy in the Federal courts is a ground of Federal equity jurisdiction.

*City Bank Co.* v. *Schnader* (1934), 291 U. S. 24, 29;
*Risty* v. *Chicago, R. I. & Pac. Ry. Co.* (1926), 270 U. S. 378, 388;
*Chicago, B. & Q. R. R.* v. *Osborne* (1924), 265 U. S. 14, 16;
*Smyth* v. *Ames* (1898), 169 U. S. 466, 515-517.

**Jurisdiction of the Supreme Court of the United States.**

As above stated, this is a direct appeal from the final decree of a specially constituted court of three judges, denying a permanent injunction in a suit brought to restrain State officers from enforcing a State statute. This Court has jurisdiction under Sections 238(3) and 266 of the Judicial Code (United States Code, Title 28, Secs. 345 and 380).

The following cases sustain the jurisdiction of this Court:
*Stratton* v. *St. Louis S. W. Ry.* (1930), 282 U. S. 10, 14, 16;
*Sterling* v. *Constantin* (1932), 287 U. S. 378, 393-394;
*Coverdale* v. *Arkansas-Louisiana Pipe Line Co.* (1938), — U. S. —, 58 S. Ct. 736, 738.

**The State Statute the Validity of Which is Involved.**

The California statute the enforcement of which is sought to be enjoined in this suit is the California Use Tax Act of 1935, Cal. Stats. 1935, p. 1297, ch. 361. Since this suit was commenced, the statute was amended, in particulars not pertinent to this suit except as hereinafter specified, by Cal. Stats. 1937, pp. 1327, 1874 and 1935, chs. 401, 671 and 683. Section 3 of the act, so far as material, provides:

"An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal

property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State, at the rate of three per cent of the sales price of such property.

Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; * * *."

Section 2(a) defines "Storage" as "any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer." Section 2(b) defines "Use" as "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business." Section 2(j) defines "In this State" as "within the exterior limits of the State of California, and includes all territory within such limits owned by or ceded to the United States of America."

Section 4 contains a number of exemptions, among which are (a) property, the gross receipts from the sale of which are taxed by the California Retail Sales Tax Act (Cal. Stats. 1933, ch. 1020) and (b) property, the storage, use or other consumption of which the State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of California. The effect of the first exemption in Section 4 is to make the use tax applicable only to tangible personal property purchased outside the State or in interstate commerce.

Section 6 requires every retailer maintaining a place of business in the State and making sales of tangible personal property for storage, use or other consumption in the State, to collect the tax from the purchaser at the time of making the sales. Section 7 makes the tax due and payable quarterly to the State Board of Equalization on or before the

15th day of the month next succeeding each quarterly period, the first quarterly period being that which commenced July 1, 1935. It also requires every retailer maintaining a place of business in the State to file with the Board, on or before the 15th day of the month following the close of each quarterly period, a return for the preceding quarterly period in the form prescribed by the Board, showing the total sales price of the tangible personal property sold by the retailer during the preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by the act; and to accompany the return by a remittance of the amount of the tax required to be collected by the retailer during that period. If the property is purchased from a retailer not maintaining a place of business in the State, the purchaser is required to file the return and remittance.

Section 8 imposes a penalty of ten per cent, plus interest of one half of one per cent per month, or fraction thereof, for failure to pay the tax or make the return.

Section 20 provides for a summary judgment for the amount of unpaid taxes in favor of the State and against the retailer or other person required to pay the tax, and permits the Board to seize the property of delinquents and sell it at public auction for the amount of the tax, interest, penalties and costs. Section 28 (Section 24 since the 1937 amendment) permits the Board to bring suit at any time within three years after any amount has become due and payable and has become delinquent, and a certificate of the Board showing the delinquency is made *prima facie* evidence of the determination of the amount due, of the delinquency, and of the compliance by the Board with all the provisions of the act in relation to the computation and determination of the amount.

Section 30 (Section 26 since the 1937 amendment) makes any retailer or other person failing or refusing to furnish

a return, or supplemental return or other data required by the Board, guilty of a misdemeanor and subject to a fine of not exceeding $500 for each offense. Section 31 (Section 27 since the 1937 amendment) makes any violation of the act, except as otherwise therein provided, a misdemeanor and punishable as such.

Section 29 (Section 25 since the 1937 amendment) forbids the issuance of any injunction or writ of mandate or other legal or equitable process in any suit, action or proceeding in any court against the State or any officer thereof to prevent or enjoin the collection of the tax or any amount of tax imposed by the act. The only remedy afforded to the taxpayer is to pay the tax under verified protest, setting forth the grounds of objection to the legality thereof, and thereafter to bring a suit against the State Treasurer in the State Superior Court in Sacramento County to recover the amount of the tax so paid. The period of limitation for such suits is sixty days (since the 1937 amendment—one year). The Superior Court is forbidden to consider any grounds of illegality other than those set forth in the protest filed at the time of the payment of the tax. If judgment in such action is rendered for the plaintiff, the amount of the judgment is first to be credited on any taxes or amounts due from the plaintiff under the act, and the balance of the judgment is to be refunded to the plaintiff with interest allowed at the rate of six per cent per annum upon the amount found to have been illegally collected, from the date of payment to the date of allowance of credit on account of the judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller (since the 1937 amendment, by the Board). The act prohibits any judgment in any such action when it is brought by or in the name of an assignee of the retailer or other person paying the tax, or by any person other than the person paying the tax.

**The Questions Involved are Substantial.**

The appellant is engaged exclusively in inextricably intermingled interstate and intrastate telephone and telegraph business. The property in question is specially manufactured telephone equipment, purchased by the appellant with operating capital for the sole purpose of using it in that business. A part of the equipment, referred to throughout the record as "specific order equipment," consists of special equipment specially designed for a particular purpose, which, upon its arrival in California, is installed and used in appellant's operating telephone plant without delay. Another part of the equipment, referred to as "stand-by facilities," consists of equipment which for efficient public service is required to be kept at various strategic points in appellant's telephone system, ready to be installed to make repairs and to meet emergency demands.

The tax is a flat-rate tax upon the use, storage or other consumption of this property, measured by three per cent of the purchase price, without apportionment to take into account the division of use between intrastate and interstate commerce.

Under the doctrine of *Helson and Randolph* v. *Kentucky* (1929), 279 U. S. 245, which was reaffirmed in *Bingaman* v. *Golden Eagle Lines* (1936), 297 U. S. 626, and was recognized in *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.* (1938), — U. S. —, 58 S. Ct. 736, State statutes taxing the use of property in interstate commerce for the operation of instrumentalities of interstate commerce are unconstitutional as in violation of the commerce clause.

Under *Cooney* v. *Mountain States Tel. Co.* (1935), 294 U. S. 384, a State excise tax cannot validly be applied indiscriminately and without apportionment to an instrumentality common to interstate and intrastate commerce.

The appellant contends that the use of the property in question, being indiscriminately in interstate and intrastate commerce, cannot constitutionally be subjected to the flat-rate, unapportioned tax in question; that the holding of stand-by facilities is a part of the conduct of its inextricably intermingled interstate and intrastate commerce and business; and that no use, storage or other consumption of the property occurs in California which is not a part of that commerce.

The District Court, upon the appellees' motion to dismiss the bill of complaint and the appellant's application for an interlocutory injunction, held that the use, keeping, retention or storage of the property which occurred in the State of California was a use in interstate commerce and was not taxable by the state, and that the case was not controlled by the decisions in *Nashville, C. & St. L. Ry.* v. *Wallace* (1933), 288 U. S. 249, and *Edelman* v. *Boeing Air Transp.* (1933), 289 U. S. 249 (see Appendices A and B). On final hearing the District Court reversed its conclusion holding that, although the stipulated facts sustained the pertinent allegations of the bill of complaint discussed in its former opinion, and although the use of the property was a use in interstate commerce, the threatened enforcement of the taxing statute would not impose a direct or undue burden on the appellant's interstate commerce business (see Appendices C and D).

This Court has never specifically decided (although appellant contends that the *Helson, Bingaman* and *Cooney* cases, *supra,* are decisive of the case) whether a use tax, measured by a fixed percentage of the purchase price of property without apportionment according to the division of use in intrastate and interstate commerce, and imposed directly upon (a) the use in inextricably intermingled interstate and intrastate commerce or (b) the installation or (c) the retention for stand-by purposes, of special telephone

equipment which is purchased by a telephone company engaged exclusively in inextricably intermingled interstate and intrastate commerce for use exclusively in that business, and which is manufactured specially for and dedicated exclusively to and is not divertible from that business, and which is used exclusively in and is necessary to the conduct of that commerce, contravenes the commerce clause of the Federal Constitution.

The questions presented, we submit, are substantial.

**The Date of the Decree Sought to be Reviewed and the Date on Which the Application for Appeal was Presented.**

The final decree of the District Court which is herein appealed from was signed and filed June 14, 1938. The application for appeal was presented June 20, 1938.

Dated June 20, 1938.

Respectfully submitted,

ALFRED SUTRO,
FRANCIS N. MARSHALL,
*Counsel for Appellant.*

## APPENDIX "A".

**Opinion of the District Court on the Motion to Dismiss and Application for Interlocutory Injunction.**

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

IN EQUITY.

No. 4067-R.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Plaintiff*,

*v.*

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS RAY L. EDGAR and RAY L. RILEY, as Members of the State Board of Equalization of the State of California; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the Attorney General of the State of California, *Defendants*.

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges.

DENMAN, *Circuit Judge*.

Plaintiff, Pacific Telephone and Telegraph Company, brings a bill for injunction against the defendants, state officers, to restrain the latters' threatened enforcement of the California Use Tax (Cal. Stats., 1935, ch. 361) upon property purchased by plaintiff outside the state and shipped within for use in its communication system which system performs inextricably intermingled interstate and intrastate commerce functions.

The case was heard together with that of Southern Pacific Company v. Corbett, Equity No. 4055-S, and the material issues are identical with those presented and decided in that case. Very little separate statement is required.

The property purchased outside the state by the plaintiff is acquired from Western Electric Company, plaintiff in case 4066-L (Equity), which is a retailer maintaining a place of business in California. The bill of complaint recites allegations substantially identical with those in the Southern Pacific case as to the allocation and dedication of the property upon its purchase to interstate commerce uses, as to the purchasing, financing and accounting being carried on under rules of the Interstate Commerce Commission, and as to any "keeping or retention" of the property within the state being in itself a use in interstate commerce.

The complaint thus describes the property:

> "A part of said property was purchased by plaintiff and shipped to it to various points in the State of California as standby telephone and telegraph facilities of plaintiff for its said interstate and intrastate telephone and telegraph business; and said part of said property was held and used by plaintiff as a part of its said interstate and intrastate telephone and telegraph system as such standby facilities as required in the performance of its obligations to the public as a public service company, and in the conduct of its said interstate and intrastate telephone and telegraph business * * *.
>
> "The remaining part of said property consisted of central office switchboards, large private branch exchange switchboards, telephone cables and components of telephone and telegraph lines purchased by plaintiff and shipped to it from time to time, under respective specific orders of plaintiff, to various points in the State of California for the immediate installation and use by plaintiff forthwith upon its shipment as part of the said interstate and intrastate telephone and telegraph system of plaintiff and for use exclusively by plaintiff for its said interstate and intrastate telephone and telegraph business * * *.
>
> "Because of the large extent of plaintiff's telephone and telegraph system so operated, it is necessary in

the interest of business economy and efficient public service for plaintiff to purchase much of its supplies in large quantities in anticipation of current and recurring needs and to effect deliveries thereof to the extent reasonably possible in carload lots to the points of distribution and use, and it is necessary to have supplies to meet current requirements distributed over the entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements as well as the regular emergency requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time unavoidably arise from the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties which arise in connection with conducting such telephone and telegraph commerce and business * * *.

"All of said articles so purchased by plaintiff from said Western Electric Company, Incorporated, were and are especially designed for use in the operation and maintenance of said telephone and telegraph system, are peculiarly adapted to telephone and telegraph uses as aforesaid and are not suitable for any other use."

It is plain from the allegations of the complaint, admitted by the motion to dismiss, that the property in question here was partly "standby" or reserve material and partly material purchased for existing maintenance needs, precisely as was the situation in the *Southern Pacific* case. Here, as in that case, the "keeping", "retention", or "storage" of the material was a use in interstate commerce preparatory to a subsequent use after physical integration in the plant.

For the reasons set out in the *Southern Pacific* case, the motion to dismiss herein is denied, and an interlocutory

injunction granted. Findings of fact, conclusions of law and decree to be submitted by plaintiff.

WILLIAM DENMAN,
*U. S. Circuit Judge.*
MICHAEL J. ROCHE,
*U. S. District Judge.*
A. F. ST. SURE,
*U. S. District Judge.*

(Endorsed:) Filed Sep. 10, 1937.

---

## APPENDIX "B".

### Opinion of the District Court on Final Hearing.

Alfred Sutro, Francis N. Marshall, Standard Oil Building, San Francisco, Attorneys for Plaintiff.

Pillsbury, Madison & Sutro, Standard Oil Building, San Francisco, of Counsel.

U. S. Webb, Attorney General, State of California; H. H. Linney, Deputy Attorney General; James J. Arditto, 640 State Building, San Francisco, Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Equity No. 4067-R,

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a Corporation), *Plaintiff,*

*v.*

JOHN C. CORBETT *et al., Defendants.*

OPINION.

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

DENMAN, *Circuit Judge:*

The stipulation of facts filed herein supports the essential allegations of the bill of complaint.

The material, the storage use of which defendants seek to tax, consists (1) of specific order equipment including central office switchboards, frames, switches, cables, wires and other essential components of telephone and telegraph transmission; and (2) reserve or "stand-by" facilities of the sort just described which must be kept on hand in sufficient quantities to meet emergencies and new demands.

The principles governing the taxation of the use of this material are identical with those applicable in Southern Pacific Co. v. Corbett, No. 4055-R (Filed May 3, 1938). For the reasons stated in our opinion in that case, we conclude that the bill herein must be dismissed.

We find the facts to be as stipulated and agreed by the parties. From those facts we conclude that the threatened enforcement of the California Use Tax Act will not impose a direct or undue burden on plaintiff's interstate commerce business.

The permanent injunction is denied and the bill dismissed.

WILLIAM DENMAN,
*United States Circuit Judge.*
MICHAEL J. ROCHE,
*United States District Judge.*
A. F. ST. SURE,
*United States District Judge.*

May 4, 1938.

(Endorsed:) Filed May 4, 1938.

# In the Supreme Court
OF THE
# United States

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OCTOBER TERM, 1938

## No. 213

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

*Appellant,*

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI and HARRY B. RILEY, as members of the State Board of Equalization of the State of California, STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA and U. S. WEBB, the Attorney General of the State of California,

*Appellees.*

**Appeal from the District Court of the United States for the Northern District of California.**

## BRIEF FOR APPELLANT.

ALFRED SUTRO,
EUGENE M. PRINCE,
FRANCIS N. MARSHALL,
Standard Oil Building, San Francisco, California,
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PILLSBURY, MADISON & SUTRO,
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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1938

No. 213

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),
*Appellant,*

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI and HARRY B. RILEY, as members of the State Board of Equalization of the State of California, STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA and U. S. WEBB, the Attorney General of the State of California,
*Appellees.*

**Appeal from the District Court of the United States for the Northern District of California.**

## BRIEF FOR APPELLANT.

## PRELIMINARY STATEMENT.

### OPINIONS BELOW.

The opinion of the District Court on the motion to dismiss the bill of complaint is not reported; its opinion on final hearing is reported in 23 F. Supp. 197. These opinions, however, are scarcely more than memoranda. They refer, for much of their discussion, to the opinions in the case of *Southern Pacific Company v. Corbett, et al.*, No. 212, October Term, 1938, reported at 20 F. Supp. 940 (on motion to dismiss) and 23 F. Supp. 193 (on final hearing), which was heard at the same time as this case.

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### JURISDICTION.

The statement as to jurisdiction has been filed, and this Court has made an order noting probable jurisdiction (October 10, 1938).

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### STATEMENT OF THE CASE.

Appellant, The Pacific Telephone and Telegraph Company, brought this suit to restrain appellees, state officers, from collecting the California use tax with respect to certain property used in appellant's interstate and intrastate telephone and telegraph business (hereinafter the word "telephone" is used for "telephone and telegraph").

Appellant contends that the use tax statute, as here sought to be applied by appellees, is invalid under the commerce clause. Equity jurisdiction is invoked upon the ground that appellant has no adequate remedy at law. We do not anticipate that the existence of equity jurisdiction

will be questioned by appellees in this Court, and we therefore pass that subject with a reference to the opinion of the trial court (20 F. Supp. 944-945, R. 44-45) and to the summary of facts and the authorities cited in our Statement as to Jurisdiction (pp. 3-4).

Pertinent provisions of the use tax statute (Cal. Stats. 1935, ch. 361, p. 1297) are quoted in the appendix. This statute imposes an "excise tax" of three per cent of the sales price on "the storage, use or other consumption in this State of tangible personal property purchased from a retailer", except property with respect to which a tax has been paid under the California Retail Sales Tax Act (Cal. Stats. 1933, ch. 1020, p. 2599). By this exception the Act is restricted in its scope to property purchased in another state and thereafter stored, used, or consumed in California. The tax is a flat rate tax, without apportionment or allowance for any division of use between intrastate and interstate commerce. Also, and unlike the Washington use tax considered by this Court in *Henneford v. Silas Mason Co.* (1937) 300 U. S. 577, it contains no provision for credit or exemption equaling the amount of sales or use taxes paid in other states.

The property here in question is telephone equipment purchased for the sole purpose of use in appellant's telephone system (Findings 9, 10, 16; R. 88, 90). This system renders an inextricably intermingled interstate and intrastate service, the same facilities being used indiscriminately for interstate and intrastate messages.

A part of the property, referred to in the record as **specific order equipment,**[1] consists of special equipment

[1]Emphasis by bold-face type or italics is ours throughout the brief unless otherwise stated.

which, upon arrival in California, is immediately installed and used in rendering telephone service (Findings 25, 26; R. 95-96). The rest of the equipment consists of stand-by facilities, which are kept at various points in the system for repair, replacement, or emergency service (Findings 29, 32, 33; R. 97, 98). All of the property, both specific order and stand-by, is specially designed and manufactured for use in a telephone system and is not suitable for any other use (Findings 23, 29; R. 94, 97).

A District Court of three judges (Jud. Code, sec. 266; U.S.C. 28:380) denied a motion to dismiss the bill and awarded an interlocutory injunction (R. 35-37), holding that, on the facts stated in the bill, the tax was invalid (20 F. Supp. 940; R. 37 et seq.). On final hearing the case was "submitted under an agreed statement of facts which sustains the pertinent allegations of the bill" (23 F. Supp. 194, 197; R. 79, 78), and the Court made findings accordingly (R. 85-103). The findings are summarized in the appendix.

Notwithstanding the findings, the Court decided for defendants (R. 78, 79-84). It reversed the ruling of law made in its first opinion and held that under the authority of three decisions rendered by this Court after the denial of the motion to dismiss, the tax was valid.

---

## SPECIFICATION OF ERRORS.

The District Court erred:

1. In concluding as a matter of law that the imposition of the California use tax upon the acts and transactions found to have occurred with respect to the tangible per-

sonal property described in the findings of fact, after the termination of the interstate transportation thereof, would not be a direct burden upon the interstate commerce and business of the appellant.

2. In concluding as a matter of law that the imposition of the California use tax upon the acts and transactions found to have occurred with respect to the tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, would not be contrary to or in violation of the provisions of clause 3 of section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the appellant thereunder.

3. In concluding as a matter of law that appellant's application for a permanent injunction should be denied and the bill of complaint dismissed.

4. In failing and refusing to conclude as a matter of law, as requested by the appellant, that the imposition of a use tax upon the acts and transactions found to have occurred with respect to the tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, would be a direct burden upon the interstate commerce and business of the appellant.

5. In failing and refusing to conclude as a matter of law, as requested by the appellant, that the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297), if applied to any act or transaction found to have occurred with respect to the specific order equipment described in the findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon

the operation of an instrumentality of interstate commerce.

6. In failing and refusing to conclude as a matter of law, as requested by the appellant, that the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297), if applied to any act or transaction found to have occurred with respect to the stand-by facilities described in the findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon the operation of an instrumentality of interstate commerce.

7. In failing and refusing to conclude as a matter of law, as requested by the appellant, that the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297), if construed and applied by the appellees so as to impose a tax upon the acts or transactions, or any of them, found to have occurred with respect to the tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of clause 3 of section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the appellant thereunder.

8. In failing and refusing to conclude as a matter of law, as requested by the appellant, that appellant is entitled to a permanent injunction as prayed for in its bill of complaint.

9. In decreeing that appellant's application for a permanent injunction be denied.

10. In decreeing that appellant's bill of complaint be dismissed.

## SUMMARY OF ARGUMENT.

The California Use Tax Act cannot validly be applied to the use of telephone property in intermingled interstate and intrastate commerce, such a tax being a direct tax upon the operation of instrumentalities of interstate commerce, falling indiscriminately and without apportionment upon the interstate as well as the intrastate use (*Helson and Randolph v. Kentucky* (1929) 279 U. S. 245; *Bingaman v. Golden Eagle Lines* (1936) 297 U. S. 626; *Cooney v. Mountain States Tel. Co.* (1935) 294 U. S. 384, 393).

The trial court's ruling that the tax may be applied to the **storage** of property prior to interstate use does not support the court's decree as to the **specific order equipment**, because there is no storage of that property prior to its use in intermingled interstate and intrastate commerce. Likewise, as to the **stand-by property**, there is no preliminary intrastate storage separable from use in the intermingled commerce, since it is true in every practical sense, as the trial court specifically found, that the stand-by service in this case is itself a necessary **use** of the property in the appellant's intermingled interstate and intrastate business.

There is in this case no intrastate enterprise, transaction, or use which is separable from the interstate use of the property. The tax upon the use of the property in suit, either in the immediate rendition of service (specific order equipment) or in a stand-by capacity (stand-by facilities), is, therefore, a direct tax upon interstate commerce. The state statute, properly construed, did not intend to impose such a tax, but if it

is otherwise construed, it is unconstitutional in that respect.

---

## ARGUMENT.

### A. SINCE THE PROPERTY IN QUESTION IS USED IN INTERMINGLED INTERSTATE AND INTRASTATE COMMERCE, AND SINCE THERE IS NO "STORAGE, USE OR OTHER CONSUMPTION" THEREOF IN CALIFORNIA, EXCEPT AS PART OF SUCH INTERMINGLED COMMERCE, THE USE OF THE PROPERTY CANNOT CONSTITUTIONALLY BE SUBJECTED TO A FLAT RATE TAX, WITHOUT APPORTIONMENT FOR THE DIVISION OF USE BETWEEN INTERSTATE AND INTRASTATE COMMERCE.

As already stated, the trial court filed an opinion denying the motion to dismiss and awarding an interlocutory injunction, in which it held that upon the facts stated by the complaint the tax was invalid. On the final submission it found the facts to be in accordance with the complaint, but reversed its ruling on the law and upheld the tax.

1. **General principles**—The trial court's first opinion was based upon principles which it considered to be well settled and which, we submit, are well settled.

> "A tax, which falls **directly** upon the use of one of the means by which commerce is carried on, **directly** burdens that commerce" *(Helson and Randolph v. Kentucky* (1929) 279 U. S. 245, 252).[2]

---

[2]See also *Bingaman v. Golden Eagle Lines* (1936) 297 U. S. 626, 628; *Gregg Dyeing Co. v. Query* (1932) 286 U. S. 472, 479; *Eastern Air Transport v. Tax. Comm.* (1932) 285 U. S. 147, 153; *Postal Telegraph Cable Co. v. Adams* (1895) 155 U. S. 688, 696-697.

These cases are direct authorities for the proposition that a state tax upon the privilege of using an instrumentality of interstate commerce is invalid.

A state tax which **directly** burdens interstate commerce is invalid.[3] This principle applies whether the tax is upon the use of an instrumentality of interstate commerce, as in the *Helson* and *Bingaman* cases (279 U. S. 252; 297 U. S. 628, supra), or whether it is upon the occupation and business which constitutes such commerce, or upon the privilege of engaging in it, or upon the receipts derived from it.[4]

The primary question is whether the tax has a direct or an indirect bearing upon interstate commerce.[5] If direct, the tax is invalid (authorities supra) and is not saved by the fact that an equal tax is laid upon intrastate commerce.[6]

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[3]*Adams Mfg. Co. v. Storen* (1938) 304 U. S. 307; *Pacific Tel. Co. v. Tax Comm'n* (1936) 297 U. S. 403; *Cooney v. Mountain States Tel. Co.* (1935) 294 U. S. 384, 392; *Minnesota v. Blasius* (1933) 290 U. S. 1, 8-9; *Ozark Pipe Line v. Monier* (1925) 266 U. S. 555; *International Paper Co. v. Massachusetts* (1918) 246 U. S. 135, 141; *Kansas City Ry. v. Kansas* (1916) 240 U. S. 227, 231; *Western Union Tel. Co. v. Kansas* (1910) 216 U. S. 1, 27; *Erie Railroad v. Pennsylvania* (1895) 158 U. S. 431, 437; *Leloup v. Port of Mobile* (1888) 127 U. S. 640, 648; *Robbins v. Shelby Taxing District* (1887) 120 U. S. 489, 493-494.

[4]*Adams Mfg. Co. v. Storen* (1938) 304 U. S. 307, 313, 314; *New Jersey Tel. Co. v. Tax Board* (1930) 280 U. S. 338, 346; *Minnesota v. Blasius* (1933) 290 U. S. 1, 9; *Kansas City Ry. v. Kansas* (1916) 240 U. S. 227, 231, and many cases cited in the foregoing opinions and in note 3, supra.

[5]*Atlantic Lumber Co. v. Comm'r* (1936) 298 U. S. 553, 557; *Gregg Dyeing Co. v. Query* (1932) 286 U. S. 472, 478; *Hump Hairpin Co. v. Emmerson* (1922) 258 U. S. 290, 294-295; *Galveston, Harrisburg etc. Ry. Co. v. Texas* (1908) 210 U. S. 217, 227, and authorities notes 2, 3, 4, 6.

[6]"The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce" (*Adams Mfg. Co. v. Storen* (1938) 304 U. S. 307, 312).

"While a State may tax the privilege of engaging in local business, as it may regulate local rates, it may not tax the

The trial court in its original opinion also held that, **where property is used in a mingled interstate and intrastate commerce and a state tax is laid indiscriminately upon the use of the property, without apportionment as between the interstate and the intrastate use, the tax is invalid.** In so holding, the court applied the principle of *Cooney v. Mountain States Tel. Co.* (1935) 294 U. S. 384, in which this Court held that a state license tax on a telephone company was invalid where the company was engaged in intermingled interstate and intrastate commerce and where the tax was measured by the number of telephones used in the state, multiplied by a flat rate. The Court said (294 U. S. 393):

> "A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce,

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privilege of engaging in interstate commerce. Taxation being one of the forms of regulation, *Lehigh Valley R. Co. v. Pennsylvania,* 145 U. S. 192, 200, any tax laid directly upon the privilege is void even in the absence of legislation by Congress or a finding of prejudice" (*Pacific Tel. Co. v. Tax Comm'n* (1936) 297 U. S. 403, 412-413).

See also citations at 304 U. S. 312, note 11, and *Sonneborn Bros. v. Cureton* (1923) 262 U. S. 506, 515; *Spalding & Bros. v. Edwards* (1923) 262 U. S. 66, 69; *Fargo v. Michigan* (1887) 121 U. S. 230, 243-244; *Case of the State Freight Tax* (1872) 15 Wall. 232, 276-277.

It is only in the case of **indirect** burdens that the validity of the tax depends on whether it is excessive or is discriminatory as against the interstate commerce (*Gregg Dyeing Co. v. Query* (1932) 286 U. S. 472, 476, 478; *Armour & Co. v. Virginia* (1918) 246 U. S. 1, 7-8).

Since the tax in the case at bar is a direct burden, the question whether it discriminates against interstate commerce in other respects is academic. We do not concede, however, that the tax is nondiscriminatory.

has frequently been held to be invalid" (citing cases).[7]

The tax involved in the case at bar thus presents, for want of apportionment, the same legal question as if it had been laid upon property used exclusively in interstate commerce. Since a state tax upon the use of any of the means by which interstate commerce is carried on is a **direct** burden upon that commerce *(Helson and Randolph v. Kentucky* (1929) 279 U. S. 245, quoted supra, and authorities supra, note 2), there would seem to be no doubt that the tax is invalid as applied to the property in suit.

In all cases involving use taxes, which have arisen in the lower federal courts and which involved the application of the tax to the use of property in interstate commerce, the courts have held the tax invalid.[8]

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[7]Similarly, in *Adams Mfg. Co. v. Storen* (1938) 304 U. S. 307, this court held invalid a one per cent tax on the income from sales made within the state, saying (p. 314):

> "It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate."

See also *Pacific Tel. Co. v. Tax Comm'n* (1936) 297 U. S. 403.

[8]*Southern Pac. Co. v. Corbett* (three-judge court, N.D. Cal., 1937) 20 F. Supp. 940 (No. 212, October Term, 1938, in this court, on the motion to dismiss. The trial court's reversal of opinion on final hearing did not affect its decision on the point here involved); *Northern Pac. Ry. Co. v. Henneford* (three-judge court, E.D. Wash., 1936) 15 F. Supp. 302 (reversed for want of jurisdictional amount (1938) 303 U. S. 17); *Mid-Continent Air Express Corporation v. Lujan* (three-judge court, D. N.M., 1931) 47 F. (2d) 266; *United States Airways v. Shaw* (three-judge court, W.D. Okl., 1930) 43 F. (2d) 148; *Minot v. Philadelphia, W. & B. R. Co.* (C.C. Del., 1870) 2 Abb. 323; Fed. Cas. No. 9,645, 17 Fed. Cas. 458, 463-465 (appeal as to this part of the case withdrawn, 18 Wall. 206, 211).

2. **The decision below**—The trial court commenced its second opinion on the final hearing in the railroad case by stating that appellant had established that **the use of the property here involved, without which its system would "stop running," is a use in interstate commerce.** But the court went on to say (23 F. Supp. 194; R. 80):

> "However, since our denial of the motion to dismiss, the Supreme Court has decided three cases dealing with the boundaries of state and federal taxation. Two of them, Western Live Stock v. Bureau of Revenue, 82 L. ed. [Adv. Op.] 548, and Coverdale v. Arkansas & Louisiana Pipe Line Co., decided April 4, 1938, significantly expand the area of the states. A third, Helvering v. Mountain Producers Corp., 82 L. ed. [Adv. Op.] 607, explicitly overrules long established concepts determining the respective taxing areas of both governments."

After discussing the last mentioned three decisions of this Court, the trial court deduced the following conclusion (23 F. Supp. 196; R. 84):

> "For the purposes of this case the dividing line is the same as in the Nashville and Edelman cases [288 U. S. 249; 289 U. S. 249] * * *. It is that the storage use and withdrawal use are prior to the actual installation of the parts and rails in the locomotive and cars and in the roadbed. Until then the increased cost, although it is paid by the passengers and freight owners, is an *'indirect'* burden on interstate commerce. Did not the Coverdale case seek to distinguish between the Nashville and Edelman cases and Helson v. Kentucky, 279 U. S. 345, we should be inclined to hold that the latter case was overruled and, though a direct burden, the tax was

as valid as the direct ad valorem tax on the railroad's property itself" (court's italics).

**It is at once apparent that, with respect to the present case, involving telephone equipment, consisting of specific order equipment and stand-by property, the trial court's statement is applicable only to the stand-by property. Under the theory above stated by the trial court, the decree as to the specific order equipment, in any event, should have been for appellant, because there is no "storage use" or "withdrawal use" of that equipment prior to its actual installation in the interstate-intrastate telephone system.** We refer to the particular facts in this connection:

3. **Specific order equipment**—Quoting from the findings:

"Specific order equipment, after the termination of the interstate shipment thereof, is installed either by plaintiff's employees or by experts in the employ of an agency hired by plaintiff to make specific installations" (R. 95). "There is no holding, in any warehouse, storeroom or other like place of deposit, of any of the specific order equipment after the termination of the interstate shipment" (R. 95). "The plaintiff orders all of the specific order equipment for immediate installation" (R. 92).

Since there is no storage of the specific order equipment, that equipment falls indistinguishably within the decisions of this Court, which have been cited. Specific order equipment is property of the same nature as that with respect to which this Court has said, in so many words, that its use in interstate commerce cannot be

subjected to a state tax. It consists, quoting again from the findings, "of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, central office cable, wire, protectors and other component parts of telephone and telegraph lines" (R. 92). In the *Helson* case, supra, in holding invalid a state tax on gasoline used in an interstate ferry, this Court said (279 U. S. 252):

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. **It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce.** A tax laid upon the use of the ferry boat, would present an exact parallel."

In *Bingaman v. Golden Eagle Lines* (1936) 297 U. S. 626, which involved a New Mexico use tax on gasoline, the *Helson* case was followed by a unanimous court (297 U. S. 628):

> "The case turns upon the question whether the pertinent statutory provisions exact a charge as compensation to the state for the use of its highways, or impose **an excise tax for the use of an instrumentality of interstate commerce.** If the former, the tax should be sustained; if the latter, it clearly **contravenes the commerce clause and must be held bad.** *Helson and Randolph v. Kentucky*, 279 U. S. 245, and cases cited."

The *Helson* case was cited with approval in *Eastern Air Transport v. Tax Comm.* (1932) 285 U. S. 147, 153; in *Gregg Dyeing Co. v. Query* (1932) 286 U. S. 472, 479; in *Nashville, C. & St. L. Ry. v. Wallace* (1933) 288 U. S. 249, 268; in *Edelman v. Boeing Air Transport* (1933) 289

U. S. 249, 253; and, at the last term of court, in *Coverdale v. Arkansas-Louisiana Pipe Line Co.* (1938) 303 U. S. 604, 611.

4. **Stand-by facilities**—The authorities which we have cited demonstrate, we submit, that the tax, as applied to the specific order equipment, is invalid. We submit that the case, considered not abstractly, but from a practical and realistic standpoint, is also clear with respect to the stand-by equipment. This consists of "small private branch exchange switchboards, teletypewriter equipment, cable, loading coils, poles, crossarms, wood conduits and a small amount of copper wire. Private branch exchange switchboards and teletypewriter printers comprise by far the largest part of the stand-by facilities" (Finding 29; R. 97).

Stand-by equipment is kept "to meet current requirements and the constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time are unavoidably made necessary * * * by reason of * * * unavoidable casualties and ordinary wear and tear" (Finding 32, R. 98).

The trial court found that a telephone system cannot operate without stand-by equipment and that stand-by equipment is **in use**. In its original opinion the court said (20 F. Supp. 946-947; R. 47-49):

> "Whether a use in storage for current consumption is a use in interstate commerce is a question of ultimate fact. Here the court must find or refuse to find this ultimate fact upon the admitted facts and upon those of which it takes judicial notice. It can-

not use 'artificial standards'. It must consider actual business and industrial concepts [citing 286 U. S. 472, 480; 297 U. S. 403, 413].

* * * * * * *

When we view realistically the facts set out in the bill, supplemented with our judicial notice of the practical necessities of a large transportation enterprise, we clearly perceive that this property is used in interstate commerce from the time of its purchase.

Consider first the property purchased for and devoted to a sole, fixed and predetermined use in an existing interstate commerce maintenance program. The storage of such property is a use which is as integral a part of the interstate commerce project as are the rails over which interstate trains are actually running.

* * * * * * *

Likewise, property purchased for the sole, fixed and predetermined purposes of serving as **'standby' or reserve equipment in an interstate commerce plant is employed in interstate commerce** from the time of its purchase. It is almost axiomatic that the far flung system of an interstate railroad cannot be conducted without the presence of reserve supplies. Unpredictable events requiring replacement and repair are of daily occurrence. A flood washes out a section of track. Can it rationally be argued that the rails and ties held in readiness against this emergency are not an integral portion of the company's interstate commerce equipment? One might as well contend that a derail switch is not in use in interstate commerce until an emergency requires it to function."

In its opinion on the final submission the court said (23 F. Supp. 194; R. 79):

"At the hearing we invited further argument and briefing, but the able presentation on behalf of the State has not answered the question, 'In what enterprise other than the intercommingled interstate and intrastate railroading is this use in storage for current repairs and replacements, without which the railroad could not operate?' **Such storage use for current installation is use in interstate commerce in any realistic sense** * * *."

5. **Cases relied on by the trial court**—The fact that the stand-by equipment is **in use** in the interstate system differentiates this case, we submit, from the three recent decisions of this Court, from which the trial court, on the final decree, concluded that the tax upon the use of stand-by property is not a **direct** burden upon interstate commerce. Those three cases all dealt with taxes on transactions **separate** from the interstate commerce or from the governmental function involved, and, of course, a tax on an intrastate transaction, separable from interstate commerce, even though closely related thereto, is an indirect burden on interstate commerce.

In *Western Live Stock v. Bureau of Revenue* (1938) 303 U. S. 250, the first of the three recent cases on which the trial court relied in reversing its original decision, this Court held that a state tax on the business of publishing a magazine, measured by the gross receipts from advertising contracts, fell upon something separate from the interstate distribution of the magazine because the business of preparing, printing, and publishing magazine advertising is peculiarly local and is distinct from interstate circulation.

In the second case, *Helvering v. Mountain Producers Corp.* (1938) 303 U. S. 376, the Court held that the federal income tax can be imposed upon the income derived by an individual from the sale of oil produced from land leased by him from the state, because such a tax upon the individual is an indirect, rather than a direct, burden upon the governmental function of the state in leasing the land.

In the third case, the *Coverdale* case (303 U. S. 604), this Court was considering a state privilege tax upon the production of mechanical power. The power there involved was ultimately used to operate compressors which increased the pressure of natural gas in an interstate gas pipe line. The Court held that the tax fell upon a transaction "just as much local as the generation of electrical power" (303 U. S. 611), and that the case was governed by such cases as *Utah Power & L. Co. v. Pfost* (1932) 286 U. S. 165. In the last mentioned case, this Court had decided that a state tax on the manufacture of electricity fell upon a process distinct from the transmission of the electricity in interstate commerce. This is very different from the proposition that stand-by equipment in an interstate telephone exchange is devoted to a use separable and distinct from the interstate telephone system. As already stated, the *Coverdale* case did not question the *Helson* case, but distinguished it, and we submit that there is the same basis of distinction between the *Coverdale* case and the case at bar.[9]

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[9]In the *Coverdale* case this Court said (303 U. S. 611-612):

"*Helson v. Kentucky*, 279 U. S. 245, *State Tax Commission v. Interstate Natural Gas Co.*, 284 U. S. 41, and *Cooney v.*

The facts of this case also differentiate it from the gasoline cases of *Nashville, C. & St. L. Ry. v. Wallace* (1933) 288 U. S. 249, and *Edelman v. Boeing Air Transport* (1933) 289 U. S. 249, 253, upon which the state officers put much reliance in the court below. Both these cases involve the **storage** or withdrawal from storage of gasoline which was thereafter used in interstate rail or airplane transportation. But in the present case there was no storage—**the stand-by property was in use** as stand-by equipment necessary to the operation of the interstate plant. The distinction noted by this Court in the *Coverdale* case as between the *Helson* case and the two cases cited by defendants is also applicable in the case at bar.[10]

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*Mountain States Tel. Co.*, 294 U. S. 384, are pressed upon us as controlling authorities for the invalidation of the tax. We think they belong to the category of cases which construe the state tax acts involved as taxes on interstate commerce and its instrumentalities rather than on operations closely connected with but distinct from that commerce. In the *Interstate* case and the *Cooney* case taxes levied on the business of engaging in interstate commerce were held invalid. Likewise, in the *Helson* case, this Court concluded that the tax on gasoline brought into the state and used on an interstate ferry was analogous to a tax on the use of the ferry itself in transit and therefore within the rule prohibiting state taxes on commerce."

Comparably, in this case the tax is a tax on the use of telephone switchboards and like property in interstate commerce, and therefore within the rule prohibiting state taxes on that commerce.

[10]In the *Coverdale* case the Court said (303 U. S. 612):

"A narrow distinction in fact exists between the tax held invalid in the *Helson* case and the valid tax considered in *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, where a tax on gasoline brought into the state, stored and then used to drive engines in interstate transportation, was held valid. The storage and withdrawal was an intrastate, taxable event. See also *Edelman v. Boeing Air Transport*, 289 U. S. 249, 252; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 479."

A further distinction should be noted between the gasoline cases and the present case. The *Helson* case decided that a state tax could not be imposed upon the use of gasoline in an interstate ferry. The *Nashville* and *Edelman* cases held that storage and withdrawal of gasoline in the state prior to interstate use was "an intrastate, taxable event" (303 U. S. 612). In both the *Nashville* and *Edelman* cases large quantities of gasoline had been stored in the state; some of it, when segregated for the purpose, was subsequently used in interstate commerce. While the gasoline was in storage no one could tell its ultimate use. Gasoline is an ordinary mercantile commodity, the nature of which is not such as to bind it irrevocably during storage to a predestined interstate purpose.[11] But in the case at

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[11]These considerations in the two decisions under discussion were the determinative factors leading to the conclusion that the storage was a separate intrastate enterprise. The opinion in the *Nashville* case (upon which the *Edelman* decision is expressly based) states (288 U. S. 266):

> "Although in the usual course of business a variable and undefined part of it, when segregated for that purpose, would again be transported across state boundaries, appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose. As nothing in the transaction before the withdrawal from storage in Tennessee can be said to have given any ascertainable part of the gasoline a destination to points beyond the state, the case is distinguishable from *Carson Petroleum Co. v. Vial*, 279 U. S. 95, and *Texas & New Orleans R. Co. v. Sabine Tram Co.*, 227 U. S. 111."

In the *Edelman* case the same decisive factors appeared, as shown by the facts recited in the opinion of the Circuit Court of Appeals (61 F. (2d) 319, 322):

> "• • • appellant sells some gasoline at Cheyenne and at Rock Springs; it displays a price sign at each place, stating the price of gasoline including the tax; other planes use both of these fields, and appellant uses gasoline locally at each field in trucks, automobiles, for testing purposes, and washing planes; there is no separate receptacle at either field in which

bar all of the property is manufactured specially and solely for use in telephone business, which is mingled interstate and intrastate, and the property, by reason of its special nature, cannot be diverted to any other use.[12] Moreover, there is no divertible surplus of stand-by facilities over and above the quantities which from time to time are actually necessary in the performance of the stand-by function; the stand-by facilities as well as the specific order equipment are purchased only at the times and in the quantities necessary to the efficient functioning of the intermingled interstate and intrastate business (Finding 15; R. 90). From every aspect, the maintenance of the telephone stand-by facilities in this case is unlike the storage of gasoline.

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appellant stores the gasoline which it sells to other airships, or buys outside Wyoming; it is all put into the storage tanks; there are gauges on the pumps, and a record was kept each time that gasoline was drawn from the tanks; the amount used locally by appellant, or sold, is in this way kept separately from the amount used by appellant in its interstate flights; it likewise measures the gasoline put into its planes for interstate commerce use."

[12] "All of the specific order equipment is especially designed for use in the operation of a telephone and telegraph system, and is peculiarly adapted to telephone and telegraph uses and is not suitable for any other use" (Finding 23; R. 94).

"All of such stand-by facilities are especially designed for use in the operation of a telephone and telegraph system, and are peculiarly adapted to telephone and telegraph uses and are not suitable for any other use" (Finding 29; R. 97).

"* * * plaintiff does not divert and has no practical way of diverting any of said articles to any use other than their intended use in plaintiff's said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business" (Finding 16; R. 90).

### B. PROPERLY CONSTRUED, THE STATUTE DOES NOT TAX THE USES HERE SHOWN.

Before concluding, we point out that though the appellants have sought to collect the use tax here in suit, there is no decision of the state courts which binds this Court to hold that the Act was intended to, or does, apply to the facts here presented.

As already noted, the statute imposes a tax upon the use of tangible personal property "**in this State**." By reason of the nature of telephone property—switchboards, teletypewriters, and other instrumentalities of telephone service—its use takes place not wholly "in this State," but also outside the state; the use and service of each instrumentality necessarily extends outside of the state. The statute does not provide a tax on use **originating** in the state, but on use **in** the state; it specifically provides, among its definitions, that "'in this State' or 'in the State' means **within the exterior limits** of the State of California." A part of the use of appellant's property is, therefore, expressly and necessarily excluded from the taxing provisions of the statute; consequently, since the statute makes no provision for any separation of this part of the use, it cannot properly be held to impose the tax in suit. This follows, we submit, from the provisions of the statute, independently of any provision of the Federal Constitution. If the statute were construed otherwise—that is, as attempting to tax the use of telephone property which, by the nature of the property and of its use, necessarily occurs in part in other states—it would be given an extraterritorial operation beyond the jurisdiction of the state, which would be contrary not only to the commerce

clause, but also to the Fourteenth Amendment. Without jurisdiction there cannot be due process of law (*Conn. General Co. v. Johnson* (1938) 303 U. S. 77, 80-81; *James v. Dravo Contracting Co.* (1937) 302 U. S. 134, 138-139; *Atl. & Pac. Tea Co. v. Grosjean* (1937) 301 U. S. 412, 424).

The trial court noted the provision in section 4(b) of the statute excluding from its operation any storage, use or other consumption of property which the state is prohibited from taxing under the Federal Constitution, saying (20 F. Supp. 946; R. 47):

> "While this does no more than declare what already is the law, it demonstrates the solicitude of the legislature toward the recognition of constitutional limitations. It indicates that when the legislature defined taxable storage and use it was anxious to insure that interstate commerce use would be protected."

The trial court then went on to point out that the construction urged by appellees requires the court to read into the statute provisions and distinctions which it does not contain (20 F. Supp. 947-948; R. 49-51).

The administrative regulations on the use tax adopted by the State Board of Equalization (whose members are among the appellees), issued July 1, 1935, and revised October 1, 1936, give a construction to the statute opposed to that for which the appellees contend in this case. Ruling No. 11 (R. 102) provides that:

> "The fact that tangible personal property is used in this State in interstate or foreign commerce **following its storage in this State** does not exempt the **storage** of the property from tax."

This regulation construes the state law as not applying to the use of property in interstate service unless there is a preliminary storage in California, in which event the tax is levied on the storage.

In the present case, as already shown, since the only "storage" appearing in the case—the maintenance of stand-by facilities—has been found to be a use in interstate commerce, there is no storage in California of any of the property under consideration prior to its use in interstate commerce.

Since the validity of the tax has not been decided by the state courts, this Court has jurisdiction to consider its validity under the state law as well as under the Federal Constitution (*Hopkins v. Southern Cal. Tel. Co.* (1928) 275 U. S. 393; *Glenn v. Field Packing Co.* (1933) 290 U. S. 177).

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## CONCLUSION.

This Court has often held that " 'The question of constitutional validity is not to be determined by artificial standards' " (*Pacific Tel. Co. v. Tax Comm'n* (1936) 297 U. S. 403, 413). It has held that the "validity of the tax is to be determined by the practical effect of enforcement" (*Graves v. Texas Company* (1936) 298 U. S. 393, 400-401). The present case involves specially designed equipment, useful only for the purpose of rendering telephone service in intermingled interstate and intrastate commerce—equipment which appellant orders, obtains and uses only for that purpose. The tax upon the use of such property,

capacity, is a direct tax upon interstate commerce, which, we submit, the state statute did not intend to impose, but which, if sought to be imposed, would render the statute unconstitutional in that respect, there being no apportionment of the amount of the tax according to the proportion of intrastate use. As to the property involved in the case at bar, consisting of the specific order equipment and the stand-by facilities, we submit that the tax clearly is invalid.

We respectfully submit that the decree should be reversed with instructions to the trial court to grant the relief sought by appellants.

Dated, San Francisco, California,
November 16, 1938.

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**(Appendix Follows.)**

## Appendix

**PERTINENT PORTIONS OF THE CALIFORNIA USE TAX ACT OF 1935 (Cal. Stats. 1935, p. 1297, ch. 361; Material in Brackets Added by Cal. Stats. 1937, p. 1935, ch. 683):**

Sec. 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

(a) "Storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of business [or subsequent use solely outside this State] of tangible personal property purchased from a retailer.

(b) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business.

* * * * * * *

(j) "In this State" or "in the State" means within the exterior limits of the State of California, and includes all territory within such limits owned by or ceded to the United States of America.

Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.

Every person storing, using or otherwise consuming in this State tangible personal property purchased from a

retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; * * *.

Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933, and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

* * * * * * *

Sec. 6. Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use or other consumption in this State, not exempted under the provisions of section 4 hereof, shall, at the time of making such sales [or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time such storage, use or other consumption becomes taxable hereunder,] collect the tax imposed by this act from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board. The tax required to be collected by the retailer from the purchaser shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sales.

Sec. 7. The tax imposed by this act shall be due and payable to the board quarterly on or before the fifteenth

day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of July, 1935, and ending on the thirtieth day of September, 1935. Every retailer maintaining a place of business in this State shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of three months, file with the board a return for the preceding quarterly period in such form as may be prescribed by the board showing the total sales price of the tangible personal property sold by the retailer, the storage, use or consumption of which became subject to the tax imposed by this act during the preceding quarterly period, and such other information as the board may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the retailer during the period covered by the return. The board, if it deems it necessary in order to insure payment to the State of the amount of tax herein required to be collected by retailers, may require returns and payment of such amount of tax for other than quarterly periods. Returns shall be signed by the retailer or his duly authorized agent but need not be verified by oath.

Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a retailer required or

authorized hereunder to collect the tax, shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of three months, file with the board a return for the preceding quarterly period in such form as may be prescribed by the board showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this act during the preceding quarterly period and with respect to which the tax was not paid to a retailer required or authorized hereunder to collect the tax, and such other information as the board may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a retailer required or authorized hereunder to collect the tax during the period covered by the return. The board, if it deems it necessary in order to insure payment to the State of the amount of such tax may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax or his duly authorized agent but need not be verified by oath.

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## SUMMARY OF THE FINDINGS OF FACT.

Appellant is a California corporation engaged exclusively in furnishing telephone[1] service in and between California and other states (R. 85, 87). Its business con-

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[1]In this summary of the findings, as in the brief, "telephone" is used for "telephone and telegraph."

sists of inextricably intermingled interstate and intrastate commerce, and its system, plant and operating capital are exclusively devoted inseparably and indiscriminately to interstate and intrastate service, the same plant, facilities and organization being devoted indiscriminately to and used indiscriminately in interstate and intrastate service (R. 85, 87-88). It is not feasible to provide separate telephone systems, one for interstate and the other for intrastate business (R. 87).

Appellees are the state officers charged with the enforcement of the California Use Tax Act of 1935 (R. 85-86).

In the conduct of its business, appellant purchases from a manufacturer outside of California necessary equipment, apparatus, materials and supplies for use exclusively in its business (R. 88). All of the articles purchased are necessary to the efficient and economic operation of appellant's telephone system, and the purchases are made at the times and in the amounts necessary to meet the needs of the business (R. 90). The manufacturer ships the property in interstate commerce to appellant at various points in California (R. 88).

The property purchased is of two general classes: "specific order equipment," i. e., that purchased on specific orders and made to order for a specific place and purpose in the telephone system, and on its arrival in California installed and used without intervening storage (R. 88-89, 92-96), and "stand-by facilities," which on arrival in the state are held in a stand-by capacity for installation to meet public demands and emergencies and to make repairs, so as to insure continuity of telephone

service (R. 89, 97-99). Appellant orders specific order equipment for immediate installation, and delivery is timed so that installation can proceed immediately (R. 92, 95). Specific order equipment is never held in any warehouse, storeroom or other like place of deposit (R. 95). There is no holding or retention of any of the specific order equipment except such as necessarily occurs in the ordinary and efficient course of transporting the property to its ultimate destination and installing it into the telephone plant (R. 96), and the same is true of stand-by facilities after they are taken from appellant's stores (R. 99). The distribution of stand-by facilities to stores located at strategic points over the system and the holding of the stand-by facilities in these stores is necessary to insure the rendition by appellant, as efficiently and as free from interruption as possible, of interstate and intrastate telephone service (R. 98).

All of the property involved is purchased with operating capital (R. 90), and is accounted for as operating property from the date of its purchase, the purchase price and cost of installation being charged to appropriate accounts of material and supplies, plant, or operating expense, in accordance with the rules prescribed by the Federal Communications Commission (R. 90-92, 100).

All of the property is specially designed for use in a telephone system, is peculiarly adapted to telephone uses, and is not suitable for any other use (R. 94, 97).[2]

---

[2]A small number of exchange telephone poles are especially designed for joint use, under joint pole agreements, with power companies, light companies, etc., for carrying appellant's telephone and telegraph wires and also the wires of such other companies. The purchase and use of joint poles in this manner is an ordinary

The property, by reason of its nature and by reason of the purpose for which and the particular specifications according to which it is manufactured, is not readily or practically salable by appellant to others, and appellant does not divert and has no practical way of diverting any of it to any other than the telephone use for which it is purchased (R. 90). Appellant uses all of the property exclusively in the operation and maintenance of its telephone system, and indiscriminately and in common for interstate and intrastate commerce (R. 100).

By reason of the intermingled interstate and intrastate business, appellant is compelled to purchase a greater amount of the property subjected to the tax, than it would be required to purchase if it were engaged only in intrastate business (R. 101).

[Further findings relate to the equity jurisdiction of the trial court, which is not here questioned.]

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and customary practice in the conduct of telephone and telegraph business. Appellant uses its part of the joint poles exclusively in its telephone and telegraph business, by means of crossarms and other equipment peculiarly adapted to telephone and telegraph uses and not suitable for any other use (R. 94-95).

*Due service and receipt of a copy of the within is hereby admitted*

*this*.....*day of November, 1938.*

.....

Attorney General of the State of California.

.....

Deputy Attorney General of the State of California.

.....

Deputy Attorney General of the State of California.

*Attorneys for Appellees.*

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CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1938

## No. 213

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),

*Appellant,*

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI and HARRY B. RILEY, as members of the State Board of Equalization of the State of California, STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA and U. S. WEBB, the Attorney General of the State of California,

*Appellees.*

**Appeal from the District Court of the United States for the Northern District of California.**

## REPLY BRIEF FOR APPELLANT.

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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*Appellees.*

**Appeal from the District Court of the United States for the Northern District of California.**

### REPLY BRIEF FOR APPELLANT.

The answering brief of appellees and the brief of the Attorney General of the State of Washington as *amicus curiae* make pertinent a short further comment.

**1. Brief of Appellees.**

The appellees do not question the doctrine of the *Helson* case (279 U. S. 245); their brief recognizes that a direct state excise tax on the use of an instrumentality of interstate commerce (which the telephone equipment in this case unquestionably is—Findings 8, 39; R. 87-88, 100; and see *Cooney* v. *Mountain States Tel. Co.* (1935), 294 U. S. 384) is a direct burden on interstate commerce and is invalid for that reason. The appellees' attempt is to distinguish the *Helson* case by urging that the tax in the instant case applies to some separable intrastate transaction affecting the property.

We reiterate that there is no storage or withdrawal from storage of the **specific order equipment.** Appellees claim that a storage occurs in the moments when the property is temporarily set down in the course of unloading or installation (Stipulation of Facts, par. 18, R. 70-71; Finding 26, R. 95-96). In this respect the facts stipulated and found are that

> "There is no holding, in any warehouse, storeroom or other like place of deposit, of any of the specific order equipment after the termination of the interstate shipment and the plaintiff's receipt thereof; * * * There is no retention or holding of any of said equipment except such as occurs in the ordinary and efficient course of transporting said equipment to its ultimate destination and installing it as physically connected parts of plaintiff's telephone and telegraph plant."

In no practical or reasonable sense is there any "storage" or "withdrawal from storage" in these necessary and incidental interruptions of movement. But even if those terms could be given such a meaning, it is well settled that a momentary storage comprising a mere temporary interruption of the course of a non-taxable interstate event does not itself acquire an intrastate character and become taxable on

that account (*Carson Petroleum Co.* v. *Vial* (1929), 279 U. S. 95; *Champlain Co.* v. *Brattleboro* (1922), 260 U. S. 366).

Appellees suggest, without argument or citation of authority, that the installation of the equipment may bear the tax. The answer is that the statute does not tax installation. But if the statute did purport to tax the installation of the property here involved, it would be invalid in that respect. A tax on installation for use, as this Court has held, is in effect a tax upon the use itself, and if permitted would defeat the ends of the constitutional protection. This Court has held that the maintenance of interstate telephone and telegraph lines and the making of repairs in the operation of interstate pipe lines—necessarily involving the installation of repair parts and improvements—are not separable intrastate activities authorizing the imposition of a state excise tax. In *Ozark Pipe Line* v. *Monier* (1925), 266 U. S. 555, the State of Missouri sought to justify a franchise tax on a company engaged in the operation of an interstate pipe line by pointing to a number of activities of the company claimed to be of an intrastate character. These activities included the maintenance and operation of telephone and telegraph lines and the purchase of supplies and equipment therefor, and the repair, by use of material and labor, of the pipe line (266 U. S. 559, 565)—necessarily including the installation of parts. This Court held the tax invalid, saying that the activities and property in question (266 U. S. 565)

> "were the means and instrumentalities by which that [interstate] business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

In commenting on the *Ozark* case in *Atlantic Lumber Co.* v. *Comm'r* (1936), 298 U. S. 553, this Court said of these activities (p. 557):

> "Neither property nor activities were anything more than aids to the operation of the pipe line; and together with that line they combined to constitute in practical effect an instrumentality of that commerce. Thus, the burden of the tax which the State imposed fell upon interstate transportation immediately and directly, * * *."

As regards installation the case is directly analogous to the loading cases. Installation for interstate use, like loading for interstate shipment, is essentially the act of putting the property in position for interstate activity, and is exclusively in furtherance of the interstate commerce. It is settled that a state cannot tax such a closely related incident of interstate commerce as the loading of goods in position for interstate shipment (*Puget Sound Co.* v. *Tax Commission* (1937), 302 U. S. 90; *Hughes Bros. Co.* v. *Minnesota* (1926), 272 U. S. 469), even where the work is done by a separate concern hired for the purpose.

With respect to **stand-by facilities**, little need be added to what has been said on this subject in our opening brief. Appellees' answer seems to be that this property is part of the general mass of property in the state and hence is subject to the state's general taxing laws. But the performance of the stand-by function, as the facts show (Finding 33; R. 98) and as the trial court held (R. 49, 79), **is use of the property in the interstate-intrastate business**; and while all the rest of appellant's plant in use is part of the general mass of property in the state and may be subjected to property taxes, yet the state may not tax **the use of that plant in interstate commerce**, nor any part of the privilege of intermingled interstate and intrastate use **without apportioning the tax to the amount of intrastate use.**

The rest of appellees' argument is devoted to the claim that the tax in question is valid because it applies to the intrastate use of the property, and to their attempt to distinguish *Cooney* v. *Mountain States Tel. Co.* (1935), 294 U. S. 384.

The appellees' statement that the tax falls upon the intrastate use alone is simply opposed to the facts. The interstate and intrastate business of appellant are inseparably intertwined (Finding 7; R. 87); the property involved is wholly used in inextricably intermingled interstate and intrastate commerce (Findings 2, 7, 8, 9, 16, 39; R. 85, 87, 88, 90, 100); and appellees have demanded the tax for the storage, use, or other consumption **of all of the property at the rate of three per cent of the purchase price of all of it, without any apportionment for the division of use between interstate and intrastate commerce.** Since there is no transaction separable from the intermingled use, and since the tax necessarily, therefore, falls on the intermingled use, and since the measure of the tax is unapportioned by any allocation of the use, it is plain that the tax is not laid upon the intrastate use alone; and appellees' mere assertion to the contrary does not change the fact.

Far from showing a situation different from that presented in the *Cooney* case, appellees show that the cases coincide. The same argument that appellees now make was made in that case and rejected by this Court (294 U. S. 388):

> "Appellants contend that the taxes are imposed solely upon intrastate commerce and do not burden interstate commerce. They insist that the taxes are laid upon the intrastate business measured by the number of telephones in intrastate use."

The argument in that case was answered, as the facts of this case answer it, by showing that since the property was used indiscriminately in both kinds of commerce, the unapportioned tax fell indiscriminately on both kinds of commerce.

As stated by this Court in *Western Union Tel Co.* v. *Kansa* (1910), 216 U. S. 1, 27,

> "the disavowal by the State of any purpose to burde interstate commerce cannot conclude the question a to the fact of such a burden being imposed, or as to th unconstitutionality of the statute as shown by its neces sary operation upon interstate commerce."

Hence it does not appear here that the tax is impose solely on account of the intrastate business, and the firs of the four requisites of constitutionality listed in th *Cooney* case [1] is lacking. The second requirement is lik wise unfulfilled, as the facts stipulated and found ampl show. Appellant is compelled to purchase more propert by reason of the interstate business than it would purcha if it were engaged in intrastate commerce alone (Findi 41; R. 101). The tax is a fixed percentage of the purcha price of the property. It follows that the amount of the ta is greater by reason of the interstate business done.

In *Raley & Bros.* v. *Richardson* (1924), 264 U. S. 15 relied on by appellees (Brief of Appellees, pp. 16-18), th interstate and intrastate businesses were plainly separat and the statute in question had been judicially construed apply to intrastate business alone.

## 2. Brief of Attorney General of Washington et al., Ami Curiae.

The contentions of the Attorney General of the State Washington which are material to the case have alrea

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[1] "Where the tax is exacted from one doing both an interstate and int state business, it must appear that it is imposed solely on account of latter, that the amount exacted is not increased because of the interst business done; that one engaged exclusively in interstate commerce wo not be subject to the tax; and that the one who is taxed could discontin the intrastate business without also withdrawing from the interstate bu ness" (294 U. S. 303).

been answered. The rest of his arguments, comprising an attempt to show that the California sales and use taxes are mutually complementary, and that the use tax is non-discriminatory and cannot result in multiple taxation, are not material because the burden of the tax on interstate commerce is direct; but even if material they would fail because they are founded on misconceptions of the California taxing statutes.

It is not correct that the sales and use taxes are both paid by the purchaser (Brief of *Amici Curiae*, p. 14). The California Retail Sales Tax Act of 1933 (Cal. Stats. 1933, p. 2599, ch. 1020) imposes upon retailers, for the privilege of selling tangible personal property at retail, a tax equal to three per cent of the gross receipts from their retail sales.[2] In *National Ice & Cold Storage Co.* v. *Pacific Fruit Express Co.* (1938), 95 Cal. Dec. 442;[3] 79 P. (2d) 380, the Supreme Court of California held that the California sales tax is a tax on the retailer and not on the purchaser, and that the provisions for passing the tax on to the purchaser[4] were invalid except in so far as the latter might consent thereto, either expressly or impliedly (95 Cal. Dec., pp. 447-448; 79

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[2] "SEC. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of * * * three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State * * *" (Cal. Stats. 1933, p. 2600, as amended with respect to the rate, Cal. Stats. 1935, p. 1253).

[3] The citation is to "California Decisions," the unofficial advance publications of the opinions of the Supreme Court of California. The case has not yet appeared in the official reports.

[4] "SEC. 4. In any case where tangible personal property is sold at retail under a contract made prior to the effective date of this act, which specifies and fixes the sale price and such sale is taxable under this act, the seller may add the tax imposed by this act to the sale price and collect it from the buyer" (Cal. Stats. 1933, p. 2600).

"SEC. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done * * *" (Cal. Stats. 1933, p. 2602).

P. (2d) 384). It is merely optional with the retailer whether he shall attempt to reimburse himself from the consumer; he may waive the right (*Roth Drug, Inc.* v. *Johnson* (1936), 13 Cal. App. (2d) 720, 736; 57 P. (2d) 1022, 1029, approved by the Supreme Court of California in the case last cited). The Use Tax Act, on the other hand, makes the tax a direct obligation of the consumer, who **must** pay the tax—to the retailer if the latter maintains a place of business in California, otherwise directly to the State Board of Equalization.[5]

Obviously, the California sales and use taxes are not mutually complementary; moreover, the California tax scheme creates a heavier deterrent to interstate commerce than to intrastate commerce, because the consumer cannot escape the three per cent use tax on his purchases interstate, but may escape the three per cent sales tax on his purchases intrastate.

Returning to the Washington Attorney General's brief: The point is made that the sales and use taxes, construed together, are no more burdensome to interstate commerce than is the ordinary property tax. Apart from the discriminatory character of the use tax shown above, the Attorney General's point has no significance except in cases where the impact of the tax upon interstate commerce is indirect. In our opening brief we have already shown that the tax in this case falls **directly** upon the whole interstate-intrastate use.

The Washington Attorney General's argument that the California use tax cannot lead to multiple taxation is untenable. In many situations property might be subjected to sales taxes, and to use taxes as well, before arrival in California, and then be subjected to a use tax in that state.

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[5] California Use Tax Act of 1935, secs. 6 and 7, Cal. Stats. 1935, p. 1300; Appendix to Brief for Appellant, pp. ii-iv.

It is obvious that the cumulative effect of all such taxes creates a discriminatory impediment to the commerce in goods originating outside California, not felt by goods originating within California and subjected only to a sales tax. This particular discriminatory feature, of course, might have been obviated by a provision in the Use Tax Act for a *pro tanto* exemption equal to the amount of sale and use taxes paid in other states. In his brief (p. 18), the Washington Attorney General seems to suppose that such a provision exists in the California statute, but such is not the fact. Such a provision does exist in the Washington Compensating Tax Act which was before this court in *Henneford* v. *Silas Mason Co.* (1937), 300 U. S. 577, and was relied upon by this court as establishing the non-discriminatory character of the tax; its absence in the California statute, we submit, brings about the very possibility of multi-state taxation which leads to invalidity under the commerce clause.

On pages 21 and 22 of his brief, the Washington Attorney General attributes to us a contention which we have nowhere made; nor have we cited the case said to have been cited by us. In these circumstances the purported answers to a non-existent contention are beside the point.

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We respectfully submit that the Brief of Appellees and the Brief of *Amici Curiae* present no answer to the points made in our opening brief.

Dated, Washington, D. C., Dec. 9, 1938.

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JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI and HARRY B. RILEY, as members of the State Board of Equalization of the State of California, STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA and U. S. WEBB, the Attorney General of the State of California,
*Appellees.*

## BRIEF OF APPELLEES

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*Appellees*.

## BRIEF OF APPELLEES

### FOREWORD

This case comes to this court on appeal from a three-judge district court decision, contemporaneously with the appeal in the case of *Southern Pacific Company* vs. *Corbett et al.*, No. 212 of this term (23 Fed. Supp. 197).

We have filed our brief in the *Southern Pacific* case and inasmuch as the two cases are practically identical we feel that in this brief we should confine ourselves strictly to this appellant's argument without repetition, in so far as it is avoidable, of the arguments made by us in our brief in the *Southern Pacific* case.

Here the "Specification of Errors" includes ten, of which three relate to conclusions of law drawn by the lower court; five relate to the failure or refusal of the lower court to make conclusions of law requested by appellant, and the last two refer, respectively, to the denial of a permanent injunction and the decree that the bill of complaint be dismissed.

## STATEMENT OF THE CASE

Except as qualified by the following summary of the pertinent facts we adopt appellant's "Statement of the Case" (brief pp. 2-4).

Pertinent provisions of the "Stipulation of Facts" show that (a) all the property in question was purchased with the intention to store, withdraw from storage and to install the same as part of appellant's telephone system (R-63, par. 3);

(b) That the uses mentioned in (a) above occur only after termination of the interstate transportation of such property (R-70, par. 17, and R-73, par. 23);

(c) That after the termination of interstate transportation of the property, the same is stored in

the State of California and thereafter withdrawn from storage (R-70, par. 18, and R-73 and 74, pars. 24 and 26);

(d) That after termination of the interstate transportation of the property, the same is installed in the telephone system in California (R-70, par. 17; R-74, pars. 26 and 27, and R-75, pars. 29, 30 and 31);

(e) That after termination of the interstate transportation of the property and installation thereof as part of appellant's telephone system, the same is used in appellant's inextricably commingled interstate and intrastate commerce (R-62 and 63, pars. 2 and 3).

In the light of the above summary of the facts we respectfully refer the court to our discussion, in the brief in the *Southern Pacific* case, of the nature of the California use tax.

Inasmuch as the appellant's argument is not devoted to the alleged errors, we will disregard them and address our argument to the points specifically argued by appellant as follows:

## ARGUMENT

### A

### "SINCE THE PROPERTY IN QUESTION IS USED IN INTERMINGLED INTERSTATE AND INTRASTATE COMMERCE, AND SINCE THERE IS NO 'STORAGE, USE OR OTHER CONSUMPTION' THEREOF IN CALIFORNIA, EXCEPT AS PART OF SUCH INTERMINGLED COMMERCE, THE USE OF THE PROPERTY CAN NOT CONSTITUTIONALLY BE SUBJECTED TO A FLAT RATE TAX WITHOUT APPORTIONMENT FOR THE DIVISION OF USE BETWEEN INTERSTATE AND INTRASTATE COMMERCE"

#### "1. General Principles"

Under this heading appellant discusses the general rule that a state tax which imposes a direct burden upon interstate commerce is invalid and seeks to apply that rule here, as the Southern Pacific Company attempted to do in its brief.

Reliance is again placed upon the *Helson* case and appellant argues from the standpoint that the first opinion of the lower court was correct and the second opinion incorrect.

In order to reach this conclusion appellant adopts this premise (brief, p. 11):

> "The tax involved in the case at bar thus presents, for want of apportionment, the same legal question as if it had been laid upon property used exclusively in interstate commerce."

This premise, of course, we do not concede. We are unable to understand, and appellant does not satisfactorily explain, why a tax upon an intrastate event, namely, storage, use or other consumption within the state, is identical with a tax upon property used *exclusively in interstate commerce.*

In our brief in the *Southern Pacific* case we have referred to the distinction between the two situations and have cited and discussed the decisions of this court which recognize the distinction and on that basis uphold state statutes which do not transgress the forbidden boundary (Appellees' Brief, *Southern Pacific* case, p. 8, *et seq.*).

*Gregg Dyeing Co.* vs. *Query,* 286 U. S. 472;
*Nashville, etc. Ry. Co.* vs. *Wallace,* 288 U. S. 249;
*Coverdale* vs. *Arkansas Louisiana Pipe Line Company,* 303 U. S. 604,

and other cases cited under Point III.

The *Helson* case is on one side of the line, while the *Nashville, Query, Coverdale* and many other cases, are on the other side of the line.

When we have a case which admittedly falls within the *Helson* case, it is proper to argue that that case is controlling. Conversely, when we have a case, as here, the facts of which show that it falls within the *Nashville* case, and others of similar background, we think it is not only proper but indispensable that this line of cases be deemed controlling.

## "2. The Decision Below"

It is here contended that even if the lower court's decision was correct as to stand-by property (see Stipulation of Facts, pars. 20 to 39; R., 72-100), it was erroneous as applied to specific order equipment since, according to appellant's contention, there is no "storage use" or "withdrawal use" of such equipment prior to actual installation in appellant's interstate-intrastate telephone system. This contention is more fully developed under the next succeeding heading.

## "3. Specific Order Equipment"

Specific order equipment is described in the Stipulation of Facts (R., pp. 67-72 and 75-77, pars. 11-19 and 29-34).

More particularly such equipment is described in paragraph 11 of the Stipulation of Facts (R., 67) as follows:

> "Specific order equipment consists of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, central office cable, wire, protectors and other component parts of telephone and telegraph lines."

Paragraph 17 of the Stipulation of Facts (R., 70) relates to the installation of specific order equipment and it is therein stated that such equipment, *after termination of the interstate shipment thereof,* is installed either by appellant's own employees or by experts hired for that purpose.

Paragraph 18 of the Stipulation of Facts (R., 70) is here quoted in full for the convenience of the court:

"There is no holding, in any warehouse, storeroom or other like place of deposit, of any of the specific order equipment after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such equipment is retained or held in the possession of the plaintiff and is not in motion in the course of installation thereof, occur between the time of termination of the interstate shipment thereof and the time when the installation of such equipment is completed and said equipment is available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from the dock or car and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. In practically all installation projects the process of connecting parts of the equipment with and into plaintiff's physical plant is under way before the gathering of all equipment involved in the project at the place of connecting the same with said plant is complete. There is no retention or holding of

any of said equipment except such as necessarily occurs in the ordinary and efficient course of transporting said equipment to its ultimate destination and installing it as physically connected parts of plaintiff's telephone and telegraph plant.

With reference to private branch exchange switchboards only, in exceptional instances it occurs that a subscriber orders such a switchboard for installation at a particular time, and that, because of construction delays and for like reasons, the place where such switchboard is to be installed is not ready when plaintiff receives such switchboard at the end of the interstate shipment thereof. Plaintiff then holds such switchboard at some convenient place until the place of installation is ready, and then installs the same as hereinabove described. The period of such holding, in the experience of plaintiff, rarely exceeds a few days."

Notwithstanding the fact, as clearly appears from the foregoing, that the interstate shipment of this equipment has terminated and the property has come to rest in the state and thereafter been stored and installed appellant proceeds to argue (brief, page 13) that "since there is no storage of the specific order equipment, that equipment falls indistinguishably within the decisions of this court, which have been cited." (Apparently referring to the *Helson*, *Bingaman* and *Cooney* cases previously cited.)

In the *Helson* case (279 U. S. 245) the facts were very different from the facts here and that case has

been distinguished by this court, probably the last occasion being in the *Coverdale* case (303 U. S. 604).

In the *Helson* case interstate commerce only was involved. When the gasoline there sought to be taxed arrived in the taxing state it was already in use in interstate commerce and at all times thereafter continued to be used in such commerce. It never came to rest in the state.

In the *Bingaman* case (297 U. S. 626) the same problem was presented as in the *Helson* case.

The *Cooney* case (294 U. S. 384) involved an occupational business tax laid *indiscriminately* upon telephone companies regardless of the type of business engaged in, that is, whether interstate or intrastate. The tax was imposed upon every person, etc. operating telephone lines and furnishing telephone service in the State of Montana, measured by the number of telephones used, controlled or operated.

The *Cooney* case was not concerned with a use tax on the *intrastate* use of telephones. At this point we respectfully refer the court to our brief in the *Southern Pacific* case (No. 212, this term) wherein we discussed the right of the State of California to impose a use tax upon purely intrastate uses, namely, storage, withdrawal from storage and installation (all of which occurred in the instant case prior to the use of the property as instrumentalities of interstate and intrastate commerce).

## "4. Stand-By Facilities"

Stand-by facilities or equipment of the telephone company are different from stand-by equipment of the railroad company only in the character of the property. There can be no different application of legal principles to the stand-by property of the Southern Pacific Company from that of the appellant here.

That a telephone system can not operate satisfactorily without stand-by equipment may be conceded. Neither could a grocery store successfully or satisfactorily serve its customers without having a reserve of commodities on hand, whether they are on display or are kept in storage. Surely it will not be argued that such property is not part of the mass of property within the state, subject to the state's taxing laws.

## "5. Cases Relied Upon By the Trial Court"

Here appellant discusses the cases referred to by the trial court in its second opinion as having been decided by this court *after* the first opinion of the lower court was announced. These cases are:

(a) *Western Live Stock* vs. *Bureau of Revenue*, (1938), 303 U. S. 250;

(b) *Helvering* vs. *Mountain Producers Corp.* (1938), 303 U. S. 376, and

(c) *Coverdale* vs. *Arkansas Louisiana Pipe Line Co.* (1938), 303 U. S. 604.

Appellant seeks to distinguish these cases along with the *Nashville* case (288 U. S. 249) and the *Edelman* case (289 U. S. 249).

We readily concede that the *Mountain Producers* case, (b) above, is not in point here owing to the wide difference in facts and the different principles of law involved.

While the facts in the *Western Live Stock* case, (a) above, are different from the facts here, this court there reviewed the general principles of law applicable to state taxation affecting interstate commerce, and noted the distinction between valid and invalid statutes.

The court stated the question as follows:

> "Section 201, c. 7, of the New Mexico Special Session Laws of 1934, levies a privilege tax upon the gross receipts of those engaged in certain specified businesses (Note No. 1). Subdivision 1 imposes a tax of 2 per cent of amounts received from the sale of advertising space by one engaged in the business of publishing newspapers or magazines. The question for decision is whether the tax laid under this statute on appellants, who sell without the state, to advertisers there, space in a journal which they publish in New Mexico and circulate to subscribers within and without the state, imposes an unconstitutional burden on interstate commerce."

In the course of its decision this court said:

> "In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and

selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co.* v. *St. Louis, supra,* 462. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen* v. *Shelby County Taxing District, supra,* sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

Viewed only as authority, *American Manufacturing Co.* v. *St. Louis, supra,* would seem decisive of the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and

publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce, Cf. *Puget Sound Stevedoring Co.* v. *Tax-Comm'n*, 302 U. S. ----, ----. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & Light Co.* v. *Pfost, supra; Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17, or by its value. *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter."

The tax was held to be valid.

If a state tax on a local privilege (that of "providing and selling advertising space in a published journal") is valid when measured by the *selling* price (or gross receipts) of such advertising, it would certainly appear that the converse would also be true, namely, that the value of the local privilege could be measured by the *purchase* price of goods, wares and materials used in the exercise of the privilege. In the case at bar the local privilege is measured by the *purchase* price of goods which seems to be as fair a way to measure the tax as to measure it by a selling price.

The *Coverdale* case, (c) above, has been reviewed and discussed in our brief in the *Southern Pacific* case and we respectfully refer the court to our argument in that brief.

The *Nashville* and *Edelman* cases are also referred to here by appellant, and it is said (brief, p. 2) that the maintenance of telephone stand-by facilities is unlike the storage of gasoline. Where the difference is, in principle, we are unable to discover, and we submit that appellant has not pointed it out.

B

## PROPERLY CONSTRUED, THE STATUTE DOES NOT TAX THE USES HERE SHOWN.

It is true, as appellant here states, that the Supreme Court of California has not yet passed upon the provisions of the Use Tax Act.

Trial courts of the state have, however, upheld the statute both as to intrastate use and as to inextricably commingled intrastate and interstate use.

Appellant here argues (brief, p. 22) that its property is not wholly used within the state but that "the use and service of each instrumentality necessarily extends outside of the State." From this appellant concludes that the act does not impose any tax upon the use of such property.

In answer to this contention we respectfully refer the court to our Statement of the Case wherein we referred to pertinent paragraphs of the Stipulation of Facts showing that all of the materials in

question herein were purchased with the intention of storing, withdrawing from storage, installing as part of appellant's telephone system, and thereafter using said materials in the operation of the telephone system, and, further, that all of said materials were actually so used, and that all of said uses occurred wholly in the State of California.

## C

## USE TAX MAY LEGALLY BE IMPOSED UPON THE INTRASTATE USE OF MATERIALS AND SUPPLIES EVEN THOUGH THE SAME ARE SUBJECT TO AN INTERSTATE USE

Heretofore we have relied principally upon the argument that the tax is applicable to all property involved in both of these cases, inasmuch as there is, in respect to such property, either storage, withdrawal from storage or installation of the same, and that either of these events is sufficient to justify the imposition of the tax since they are alike events local in character.

We now come to our final proposition which is this:

That assuming there is no previous storage, or withdrawal from storage, the fact of intrastate use, even though it be inextricably commingled with interstate use, is sufficient to justify the imposition of the tax.

The argument now to be presented is applicable not only to this case but also to the *Southern Pacific* case (No. 212, this term).

Again may we remind the court that the act by its terms and as it is administered imposes the tax upon the privilege of storage, use or other consumption in the state and that the amount of the tax is measured by the purchase price and is not in any way affected by interstate use, or by gross receipts.

A company engaged solely in intrastate commerce would pay exactly the same tax as any other company, on an identical purchase. There is no recurrence of the tax, and in this respect it is unlike a property tax which recurs annually.

The privilege of local use is a taxable privilege.

*Henneford* vs. *Silas Mason Company*, 300 U. S. 577.

If local use only were involved, the *Silas Mason* case would be determinative of the question. But it is contended that because the local use is combined inextricably with an interstate use, the tax is a direct burden upon interstate commerce and therefore invalid.

If the tax upon the local use or privilege of local use were measured by gross receipts from *all* uses, there might, under the authoritative cases, be merit in the contention. We know, however, that such is not the case here. The interstate use adds nothing to the amount of the tax, so that it is impossible to vision a burden upon such use or a discrimination against it.

In this connection see the case of *Raley & Bros.* vs. *Richardson* (1923), 264 U. S. 157.

In the *Raley* case the question before the court was the validity of a state tax at a flat sum upon brokers soliciting orders from dealers in the state, which orders were sent to be filled sometimes to nonresident and sometimes to resident principals, the greater part of the business being with nonresident principals.

Mr. Justice Sutherland for the court said:

"The contention is that the tax is laid, expressly, upon all brokers and commission merchants in the State and upon the business done by them, whether interstate or intrastate, without separating one from the other. The state courts, by whose construction we are bound, held that the statute did not apply to interstate business; and we consider it as though it so provided in terms. It was held, however, that inasmuch as Class B complainants were engaged in intrastate business they were subject to the tax, and none the less because they were also engaged in interstate business. With this conclusion we fully agree.

The complainants were definitely engaged in the domestic business described in the statute and were liable to the tax, irrespective of the extent of it and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, but the former a mere incident of the latter, the burden was upon complainants to

furnish the proof; in which case a different question would arise. *Kehrer* v. *Stewart*, 197 U. S. 60, 69. Certainly, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business."

In

*Cooney* vs. *Mountain States Tel. Co.*, 294 U. S. 384,

at page 392, the *Raley* case was cited with approval together with the following cases:

*Ratterman* vs. *Western Union Telegraph Co.*, 127 U. S. 411;
*Pacific Express Co.* vs. *Seibert*, 142 U. S. 339;
*Lehigh Valley R. Co.* vs. *Pennsylvania*, 145 U. S. 192;
*Postal Telegraph Cable Co.* vs. *Charleston*, 153 U. S. 692;
*Osborne* vs. *Florida*, 164 U. S. 650;
*Pullman Co.* vs. *Adams*, 189 U. S. 420;
*Allen* vs. *Pullman Co.*, 191 U. S. 171;
*Kehrer* vs. *Stewart*, 197 U. S. 60;
*Ohio Tax Cases*, 232 U. S. 576;
*St. Louis Southwestern Ry. Co.* vs. *Arkansas*, 235 U. S. 350;
*People ex rel. Cornell Steamboat Co.* vs. *Sohmer*, 235 U. S. 549;
*Postal Telegraph Cable Co.* vs. *Richmond*, 249 U. S. 252;
*Postal Telegraph Cable Co.* vs. *Fremont*, 255 U. S. 124;
*East Ohio Gas Co.* vs. *Tax Commission*, 283 U. S. 465.

It seems clear, therefore, that the court was of the opinion that the *Cooney* case was distinguished by its particular facts from the *Raley* case and the other cases cited above upon which we rely here.

In *Pacific Telephone and Telegraph Company* vs. *Tax Commission,* 297 U. S. 403, 414, where the *Cooney* case was distinguished, this court, speaking through Mr. Justice Brandeis, held:

(a) A tax upon a local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce;

(b) In its effect upon interstate commerce an occupation tax upon local business does not differ from an *ad valorem* property tax upon tangible property used exclusively in such business. Each increases the necessary cost of doing the local business;

(c) No reason has been suggested why a tax upon a local business should be held void, if despite its burden, the local business is conducted at a profit; or if, although conducted at an apparent loss, the corporation desires to continue it because of benefits present or prospective;

(d) One can not avoid a tax upon a taxable business by also engaging in a nontaxable business;

(e) No decision of this court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely be-

cause the local and interstate branches are for some reason inseparable;

(f) Since the occupation tax challenged is not shown to be a direct burden upon the company's interstate business, the judgment against it is affirmed.

At page 413 of said opinion this court said:

"* * * But the high tax on the local privilege, like the low rate for the local traffic, if it burdens interstate commerce at all, does so by reason of its consequences. This being so, a tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce. 'The question of constitutional validity is not to be determined by artificial standards.' See *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 480, 52 S. Ct. 631, 634, 76 L. Ed. 1232, 84 A. L. R. 831. The alleged indirect tax must be judged by its practical operation.

"*In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an ad valorem property tax upon tangible property used exclusively in such business.* Each increases the necessary cost of doing the local business. Either might conceivably be so large as to render the local business immediately unprofitable. A common carrier cannot be compelled to carry on business indefinitely at a loss. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323; *Bullock* v. *Florida*, 254 U. S. 513, 520, 521, 41 S. Ct. 193, 65 L. Ed. 380; *Railroad*

*Commission* v. *Eastern Texas R. Co.*, 264 U. S. 79, 85, 44 S. Ct. 247, 68 L. Ed. 569. If, because of such loss, a corporation, seeing no prospect of betterment, wished to discontinue its local business and were prevented by law from doing so unless it discontinued also its interstate business, the law might be held void as imposing an unconstitutional condition upon the privilege of engaging in interstate commerce. Compare *Pullman Co.* v. *Adams*, 189 U. S. 420, 23 S. Ct. 494, 47 L. Ed. 877. If it was the tax which caused the unprofitableness of the local business and, consequently, the desire to discontinue it, the tax would then appear as a direct burden on interstate commerce. Compare *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 258, 39 S. Ct. 265, 63 L. Ed. 590; *Postal Telegraph-Cable Co.* v. *Fremont*, 255 U. S. 124, 127, 41 S. Ct. 279, 65 L. Ed. 545. But no reason has been suggested why a tax upon the local business should be held void, if, despite its burden, the local business is conducted at a profit; or if, although conducted at an apparent loss, the corporation desires to continue it because of benefits present or prospective. Compare *Ohio Tax Cases*, 232 U. S. 576, 590, 34 S. Ct. 372, 58 L. Ed. 737.

Second. Inherently the tax challenged is unobjectionable. It is not upon an instrumentality of interstate commerce; it is moderate in amount; and is not a disguised attempt to discriminate against interstate commerce. As the collection is being made by an action at law, the tax is not open to the objection raised in *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S.

530, 554, 8 S. Ct. 961, 31 L. Ed. 790, that payment may be made a condition of continuing to do business. Compare *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 119, 41 S. Ct. 45, 65 L. Ed. 165. The tax is 'imposed solely on account of the intrastate business;' and it appears that the amount exacted is not increased 'because of the interstate business done.' Compare *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, 51 S. Ct. 499, 500, 75 L. Ed. 1171. Although the two branches of the business of the companies are inseparable, the tax is not laid inseparably upon both. Thus it is not open to the objection held fatal in *Leloup* v. *Mobile*, 127 U. S. 640, 8 S. Ct. 1380, 32 L. Ed 311, and *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384, 55 S. Ct. 477, 79 L. Ed. 934. 'Certainly one cannot avoid a tax upon a taxable business by also engaging in a nontaxable business.' *Raley & Bros.* v. *Richardson*, 264, U. S. 157, 159, 44 S. Ct. 256, 257, 68 L. Ed. 616 * * *."

When we consider that plaintiff uses every article that it purchases in conducting its intrastate commerce and that we do not find any reference in the complaint or the stipulation to the possible effect of the tax on plaintiff's profits or losses along with the *general* statement that plaintiff is compelled to purchase, use and consume a greater amount of property than it would purchase if it were engaged only in intrastate commerce, we submit that plaintiff *has not sustained* the burden imposed upon it

of proving the *direct* interference upon interstate commerce resulting from the imposition of this tax.

Certainly there might possibly be some remote burden, but in the case of property taxation on instrumentalities of interstate commerce we also find a remote burden which has been repeatedly held to be insufficient to invalidate the tax.

This court has recognized that the power to tax is vital to a state, and it has given to that power a form which permits some incursion on interstate commerce; i.e., it is only when the tax directly interferes with interstate commerce that it is invalidated.

The California Use Tax Act as written and administered:

(1) Imposes a tax solely for the privilege of using the materials in intrastate commerce;

(2) The amount exacted is not increased because of the interstate business done. The mere fact that more materials are purchased than would be the case if the plaintiff was engaged solely in intrastate commerce is immaterial for the obvious reason that all material purchased is subject to an *intrastate* use and the tax is imposed *because* of the intrastate use. The tax is measured by the selling price of the property regardless of the amount of business done—i.e., interstate or intrastate. The interstate commerce is not considered whatsoever but the incidence of the tax arises at the time it is stored, *used* or consumed in intrastate commerce.

(3) The tax does not fall on use solely in interstate commerce.

In so far as the fourth test laid down by the court in the *Cooney* case is concerned, we ask the court to consider, realizing the California use tax is imposed on intrastate use alone, the following language in the case of *Pacific Telephone and Telegraph Co.* vs. *Tax Commission, supra,* at pages 415, 416:

> "The distinction drawn by those cases between an occupation tax valid because laid only on local business and one void because laid inseparably upon the whole business is clearly shown in the discussion of the two classes of taxes involved in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 646, 647, 41 S. Ct. 606, 65 L. Ed. 1139. Taxes for the privilege of doing local business measured by the gross income of such business have frequently been laid upon concerns engaged in both intrastate and interstate business; and have, for half a century, been sustained *without inquiry whether withdrawal from the local business would compel discontinuance of the interstate.* That an occupation tax upon a foreign telegraph company measured by earnings from its local business is valid was indicated as early as *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460, 464, 465, 26 L. Ed. 1067; and was definitely held in *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229, which has been repeatedly cited with approval, in cases involving interstate railroads and telegraph companies.

Similarly, in *Southern Ry. Co.* v. *Watts*, 260 U. S. 519, 529, 530, 43 S. Ct. 192, 67 L. Ed. 375, a so-called franchise tax for the privilege of doing intrastate business, measured by a percentage of the value of property subject also to an ad valorem tax, was sustained as against both foreign and domestic railroads.

No decision of this court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable.

In cases relied upon by appellants, there are expressions which may seem to support that contention. But in none of those cases was the challenged tax measured by the gross income of the intrastate business only. In some it was laid inseparably upon the privilege of doing both interstate and intrastate business. In some the case was suggested of a compulsory local service which, coupled with a tax, might burden interstate commerce. In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355, and *Pullman Co.* v. *Kansas*, 216 U. S. 56, 30 S. Ct. 232, 54 L. Ed. 378, the question presented and on which the Court divided, was whether payment of a confessedly unconstitutional tax could be made a condition of permitting a foreign corporation to exercise the privilege of continuing to do intrastate business within the state. *It is true that in Sprout* v. *City of South Bend*, 277 U. S. 163, 171, 48 S. Ct. 502, 505, 72 L. Ed. 833, 62 A. L. R. 45, *the Court when reciting the essentials of a valid license fee for doing local business, said that it must appear*

*'that the person taxed could discontinue the intrastate business without withdrawing also from the interstate.' But that statement was made in discussing the validity of a flat bus license fee, prescribed by an ordinance which made no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce; and it must be read in that context. The license fee was held void, because Sprout, who was engaged in both classes of commerce, could not escape payment of the tax by confining himself to interstate business. The cases cited by the Court in that connection were of the same character. * * *"*

In conclusion, we submit that the California use tax may validly be imposed upon the following uses by appellant of the property in question here:

1. The uses which are closely connected with appellant's interstate commerce but which occur prior to actual use in such commerce, namely, storage, withdrawal from storage, and installation;

2. Actual use in intrastate commerce notwithstanding the fact that such use is inextricably commingled with interstate use.

We submit, therefore, that the final decree of the lower court herein should be affirmed.

Respectfully submitted.

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O

# SUPREME COURT OF THE UNITED STATES.

No. 213.—October Term, 1938.

The Pacific Telephone and Telegraph Company, a Corporation, Appellant,
*vs.*
Andrew J. Gallagher, Fred E. Stewart, Richard E. Collins, William G. Bonelli, and Harry B. Riley, as Members of the State Board of Equalization of the State of California, et al.

Appeal from the District Court of the United States for the Northern District of California.

[January 30, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

This case involves the same questions as *Southern Pacific Company* v. *Corbett*, No. 212, decided today. The appellant sought to restrain the State Board of Equalization of the State of California, its members, and the Attorney General of the state from enforcing the Use Tax of 1935. A three-judge court granted an interlocutory injunction. Later, it denied a permanent injunction and dismissed the appellant's bill[1] for the reasons stated in *Southern Pacific Company* v. *Corbett*, 23 F. Supp. 193.

The appellant, a California corporation, operates a telephone and telegraph system in interstate and intrastate commerce. The same plant, facilities and organization are devoted to both interstate and intrastate business. In the necessary operation, maintenance and repair of its system, the appellant purchases outside California large amounts of equipment, apparatus, materials and supplies which are shipped to it in interstate commerce at various points within the state. The tangible personal property which the appellees threaten to tax is of two general classes: specific order and stand-by equipment. The first consists of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, central office cable, wire, protectors and other component parts of telephone and tele-

[1] Pacific Tel. & Tel. Co. v. Corbett, 23 F. Supp. 197.

graph lines, which are purchased on specific order for installation at a particular place in the system. The second comprises goods bought from time to time for holding as stand-by supplies to meet fluctuating demands and emergencies and to make repairs.

The specific order equipment is shipped to the appellant at the place of use. Its representative receipts for the goods at the dock or breaks the seal of the railroad car, and its employees unload the goods from the dock or car into its trucks. In most instances the trucks are driven directly to the building where the equipment is to be installed; in some, to distributing centers for reloading into other trucks which are driven to the place of installation. Occasionally, private branch exchange switchboards must be held by the appellant until the place of installation is ready. There is no holding in warehouses. The stand-by supplies which constitute a reserve to meet current requirements are replenished by monthly orders. The appellant's trucks pick them up at the dock or railroad depot and carry them to storage places at points on the system suitable for prompt distribution. When needed, the stand-by facilities are taken out of the stores and installed.

The appellant exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the appellant and those disposed of in *Southern Pacific Co.* v. *Corbett*, decided today.

The decree of the lower court dismissing the appellant's bill is

*Affirmed.*

Mr. Justice McReynolds and Mr. Justice Butler dissent.

Mr. Justice Roberts took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*